

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF LOUISIANA.**

EASTERN DISTRICT, JULY TERM, 1830.

Eastern District,  
 July, 1830.

**M'NEIL & AL. vs. COLEMAN.**

**M'NEIL & AL.**  
 vs.  
**COLEMAN.**

**APPEAL from the court of the first district.**

**Eustis**, for the plaintiff. This is an action of revendication, for the recovery of thirteen bales of cotton, which the plaintiffs claim as consignees, for the benefit of their principal, **W. King of Mississippi**.

They aver that, on the third of April last, the cotton was shipped on board of a boat, of which one **Crawford** was master, to be transported to New Orleans; that it was shipped as the property of **King** by **Fisk & M'Neil**, the consignors; that **Crawford** was a common carrier; and that the defendant has unlawfully taken possession of, and refuses to deliver it.

Whether a male, by a common carrier, vests the property of the goods?

If the defendant relies on special pleas alone, there is no need of any proof of the allegation in the petition.

East'n District  
July, 1820.

M'NEIL & AL.  
VS.  
COLEMAN.

The answer contains no general denial of the allegations of the petition; but sets forth, that the defendant purchased the cotton for a valuable consideration, in market overt; that it is his property and not the property of King; and that there was no consideration given by King to Crawford.

Our statute requires that defendants shall answer, without evasion, every material fact stated in the plaintiff's petition. 2 *Martin's Digest*, 154. Our practice has been, and the construction of the statute warrants it, that all these allegations, which are not answered without evasion, shall be taken pro confesso.

We have then the following facts which are established by the defendant's admission:

That the bill of lading, annexed to the petition, is that which was given by Crawford for the latter.

That Crawford was a common carrier.

The fact of the shipment and consignment to the plaintiffs.

The counsel for the defendant has rested his principal defence, on a supposed deficiency in our proof, with regard to the property being vested in the individual, for whose benefit this suit is instituted, unless it appears that the right of property is in him. Let it be admitted, for the sake

of argument only, that the plaintiffs cannot recover.


East'n District  
July, 1830.

  
M'NEIL & AL.  
VS.  
COLEMAN.

Fisk and M'Neil, of Natchez, commission merchants, were the factors of King, and consigned the thirteen bales of cotton to their friends in New Orleans, M'Neil, Fisk & co. as the property of Wm. King. This is proved by the affidavit of Lessassier, one of the partners of the latter house, and by the testimony of Stebbins Fisk, a witness for the plaintiffs, who derives his knowledge from the letters of the consignors to the consignees. When one merchant ships goods to another and informs him by letter, that they do not belong to him, but are the property of some one else, the consignee holds the goods for his benefit and the principal is in possession of them, by the interposition of his agent. *Tit. de acquirenda & amittenda possessione, ff. 41. 2. 1. § 20. Commentary of Cujas quoted 7 Martin, 60.*

The letters accompanying consignments are conclusive evidence of the property, as it regards the consignee; he knows no one else, in his transactions, but the person whose property he has in his possession. The bill of lading shews for whom the carrier, Crawford, possessed; as that instrument is not denied, full effect must be given to its contents; and it imports

East'n District.  
July, 1830.

  
McNEIL & AL.

vs.  
COLEMAN.

that the cotton was to be delivered at New-Orleans to the consignees, who would have held it subject to the instructions they had received from the consignors at Natchez, as the property of Wm. King.

So that it appears that the possession of Wm. King was maintained by him, through the interposition of his agents, until it was divested by the tortious conversion of the carrier.

It is sufficient for the plaintiffs to shew, that the cotton was lawfully in the possession of the agents of King, before it came into the possession of the defendant. The fact of previous possession, on their part, established as it is by testimony and by the admission of the defendant, would entitle them to recover the possession against the defendant, who is proved to have acquired the actual seizin of the cotton under the strongest circumstances of suspicion. It is proved and admitted that he knew the character of Crawford; they were seen frequently together in company; it is not denied that he was a common carrier. The men, engaged in transporting the cotton from the boat to Rust's house, had been previously arrested by the marshal of the United States; and the people, who were in the habit of being about the house may have done them and Craw-

ford injustice, in supposing they were all concerned in an unlawful enterprize ; nevertheless, such was the report and understanding.

East'n District 1.  
July, 1820.

McNEIL & AL  
vs.  
COLEMAN.

The house, to which he brought the cotton, was the last place in the city in which a person, unless he wished to escape the observation of merchants and persons who would be apt to recognize him, would have thought of storing cotton. The character of the house and its visitors is fully explained in the evidence, and we cannot hesitate, for a moment, in believing, with one of the witnesses, that no cotton has been brought there before or since the present parcel. The circumstance of the defendant's applying to the proprietor of the house in the night, for the storage of the cotton, and the general sentiment of the by-standers, ought to induce the opinion, that the possession was not such as to form the basis of a title to the property. *Me-llus est nullum titulum habere, quam vitiosum.*

The defendant has not pretended to prove, in what manner and under what circumstances, the cotton came into his possession. He has averred that he bought it in open market ; he has not proved it. He relies on his simple possession, which we have shewn to be tortious, and acquired from a person who had no right to divest himself of it, to the prejudice of the owner.

East'n District.  
July, 1820.


M'NEIL & AL.  
vs.  
COLMAN.

The right of consignees, to property consigned to them, is very fully explained in the argument of justice Buller, before the house of lords, in the case of *Leckborrow vs. Mason*, reported in 6 *East*, 72, to which I beg leave to refer the court, in order to shew that no person had any right to transfer the property claimed in this case, except the consignees, M'Neil, Fisk & co.

But, if we had no proof of the property being vested in King, by the defendant's answer alone, we contend, that we should be entitled to recover.

The general issue is not pleaded; the allegations of the petition are not denied, but a special defence is set up against our demand, of a purchase for a valuable consideration in market overt; which the defendant has not deemed material, to support by testimony. On the face of the pleadings, we should have prevailed, without the aid of testimony; the bill of lading, which is the title of property, being admitted, or taken as confessed (it not being denied by the defendant) and the plea of the want of consideration between King and Crawford, not being substantiated, judgment for the plaintiffs ought to have followed of course.

The defendant says, in his answer, "that no

consideration was ever paid by the said King, East'n District  
July, 1820. to the said Crawford, for the said cotton ; that  the same was fraudulent, as between the said M'Neil & al.  
vs.  
Crawford. two parties."

Is this not an express recognition of the existence of a contract between these parties ; and what contract can be alluded to, except the contract of affreightment ? There is no other averred in the petition ; none other stated in the answer, between King and Crawford.

It admits then, that King was a party to the contract made with Crawford for the transportation, that there was an obligation on the part of King to pay Crawford, which it is averred he has not done. On what was this obligation founded, we ask, unless on his being the owner of the cotton, and, as such, bound to pay the carrier for its transportation ? Such was the fact : King contracted through his agents, Fisk and M'Neil with Crawford the carrier, for the transportation of the cotton. The defendant has pleaded that this contract was in fraud and without consideration ; but has proved neither.

A plaintiff in his action on a written contract, if it be not denied, and if the want of consideration and fraud are pleaded, is surely not obliged to prove the execution. This would not be required in any court of justice, for *suggestio*

East'n District.  
July, 1820.

MCNEIL & AL.  
VS.  
COLEMAN.

*unius confessio alterius est.* So, in the present case, the defendant will not be permitted to say that the contract of affreightment was not made with King, nor to deny that the person, with whom Crawford contracted, was not the owner of the cotton, or had such an interest therein, as would authorise him to contract for its transportation, and to reclaim it from the possession of any person, unless it was bought for a bona fide consideration from the consignees.

But, how happens it, we ask, that the defendant knew of this fraud and want of consideration between the carrier and the owner? Was he informed of this, when he bought the cotton, if he ever can be supposed to have bought it? Did he know that the carrier contracted with King for the transportation of the cotton, and will he pretend that he has a better right to it, than King?

The possession of Coleman was not of such a nature as to form the basis of a title to the property, to enable him to retain it against him who was in possession prior to its being delivered to the defendant by Crawford. *Do-mat, 7, 3, § 7.*

It was acquired from a person, who had no right to deliver it or to dispose of it, in any manner, to the prejudice of his principal, who

received it under a contract of bailment which, East'n District.  
July, 1820. from the character of Crawford, must have been known to the defendant, who could not have McNEIL & AL.  
vs.  
COLEMAN. been ignorant of the inability of a common carrier to convey any property, in the goods entrusted to his care, by a sale, to a third person.

*Une quatrième espece de vice ou defaut, dans les possessions est celle qui resulte de l'inhabilité du titre dont elle procède à transferer la propriété. Pot. traité de la possession, no. 20.*

A possessor *de mauvaise foi* is he who possesses, with a knowledge that he has no title or of the defects of the title. *Domat*, 7, 1, § 1.

"These, also, are considered as possessors in bad faith, who, foreseeing that the right they pretend to have will be contested, and that they will be prevented from taking possession, take some occasion to obtain it by stealth, without the knowledge of those who have a right to oust them." *Ib.* 12.

The different consequences and rights which possession gives to them who hold in good or in bad faith are explained in *Domat*, 7, 8, 7.

From these authorities, and from the evidence of the plaintiffs, the conclusion is irresistible, that, the defendant cannot retain possession of the property to the prejudice of the party, from whom the carrier received it.

East'n District.  
July, 1820

M'NEIL & AL.  
vs.  
COLEMAN.

The case of *Mitchell vs. Comyns*, 1 *Martin*, 133, resembles, in very many respects, the present. The answer there *did not deny any of the allegations of the petition*, but set up a claim to the slave (which was the property sued for) grounded on a contract of sale, which, it was contended, was made in market overt. The sale was not proved to have been made in market overt; no evidence was adduced by the plaintiff; nothing was brought forward to establish his claim to the property, except the affidavit of his agent, and on the defendant's failing to establish his defence, judgment was entered for the plaintiff.

The case, now before the court, is much stronger than that just cited. No proof of property was there adduced by the plaintiff; but, in this case, we have an implied acknowledgment of it by the defendant, supported by testimony, which is incontrovertible.

In the opinion of judge Derbigny, pronounced in the case of *M. Neil vs. Thompson*, 5 *Martin*, 561, in which one person sued in behalf of another, will be found the law on the subject of nominal and real plaintiffs. The learned judge there intimates, that the declaration of one person, that he sues for the use of another amounts to a relinquishment of the

rights of the former to the latter, and in that case, he ruled that it was sufficient to enable the individual, in whose favour the relinquishment was made, to appear as plaintiff.

East'n District  
July, 1820.

M'NAY & AL  
vs.  
COLMAN.

But there is another allegation in our petition which is very material and is not denied or controverted by the defendant. We aver, that we, as consignees of the cotton, have the right to sue for the same, for the use of the said King. Thus it is admitted, that we have a right to sue on behalf of our principal; that we are his agents; and we have declared in the affidavit, on which the order of sequestration was issued, that, though we were the consignees and had a beneficial interest therein, that our principal, W. King, was the proprietor of the cotton.

The district judge has predicated his judgment, on what he thought to be the custom. It is sufficient to observe, in answer to this, that no such custom was pleaded or proved. Customs can have no effect in suits, unless they have been heretofore established by judicial decision, or are proved by testimony. 1 *Blackstone's Commentary*, 76.

The law under which we claim is so well settled, that it would be useless to urge arguments in its support. The following are a few of the authorities to which the court is referred. Do-

East'n District  
July, 1830.



M'NEIL & AL.

vs.

COLEMAN.

*mat, supplement, 3, 8, § 10. Merlin, Répertoire de Jurisprudence. Verbo Vol. Jurisprudence du Code Civil.* Commentary on the article in the civil code relating to stolen goods. 1 *Livermore on Agency*, 123. 172, 177, 2d vol. 223, 6, 8 *Massachusetts Term Reports*, 518, which contain a mass of decisions of the English courts to the same effect.

*Ripley*, for the defendant. In this case, there can be no room, as appears to me, for doubt. The defendant had in his possession thirteen bales of cotton, which he had fairly purchased. The plaintiffs claim them. To their demand, the defendant files an answer, in the nature of double pleading.

The first allegation in the answer is, that the thirteen bales of cotton, mentioned in the plaintiffs' petition, were sold to him in market overt, and that the said cotton is lawfully the property of him, the said Coleman.

The second, that said King never had paid Crawford any consideration for the said cotton, and that the transaction was fraudulent.

Either of these allegations, if true, is sufficient to bar the plaintiff's title to the cotton.

The proof of the cotton being lawfully the property is possession. The defendant is bound

to prove nothing else, until a color of title is set up. *East'n District, July, 1830.* This allegation, that the defendant had a lawful title, puts the plaintiff upon his proof of a paramount one. *M'Neil & Fisk vs. Crawford* Let us see what that proof amounts to, in the present case.

Crawford's bill of lading is not proved, nor is it even proved that King had the property in his possession. The only attempt at proof is in a letter from M'Neil & Fisk, of Natchez, stating that they would ship cotton to the house in New-Orleans. This testimony amounts to no legal proof, for it is the letter of the plaintiffs on record. If M'Neil & Fisk could be witnesses, their depositions ought to be taken. If they cannot be, it is not competent to read their letters in evidence.

Again, even the letter is not produced; but its contents are testified to. This is violating all the rules of evidence.

By averring that the legal property was in us, we have made a general denial of all the allegations in the plaintiffs' petition. If to an action on a note of hand, the defendant answers he owes nothing, it is incumbent on the plaintiff to prove the execution of the note. If, in an action of trover, the defendant pleads legal property in himself, it is incumbent on the plaintiff to prove a paramount title. And possession is

East'n District  
July, 1830.

MCNEIL & AL.  
VS.  
COLEMAN.

good against all the world, unless a better title is proved. The present action is in the nature of the common law action of trover. We have the possession of the property, and we have averred that the legal property was in us. There is no testimony adduced which shows a particle of right or title in the petition.

In a case of this kind, it is impossible to reason; for there are no facts about which, to raise a discussion. It is impracticable to quote authority; for there is no case, whatever, made out by the plaintiffs, to which they can be applied. They have made a claim to property which we contest; but they have adduced no evidence in support of their claim.

MARTIN, J. delivered the opinion of the court. McNeil, Fisk & co. of New-Orleans, who sue in behalf of W. King, of the state of Mississippi, state that Fisk & McNeil, of Natchez, shipped on board of a boat, of which Samuel Crawford was master, and a common carrier, thirteen bales of cotton, for the account of said King, consigned to McNeil, Fisk & co. that the defendant has unlawfully possessed himself of the cotton.

The defendant answers that the cotton was by him fairly purchased in market overt, and he is

a *bona fide* purchaser, for a valuable consideration ; that no consideration was paid by King to Crawford, and the transaction between them is a fraudulent one.

East's District  
July, 1830.  
McNair & al  
vs.  
Crawford

The district court gave judgment for the defendant, being of opinion that " there was no evidence which shews the defendant had any knowledge that the cotton was consigned to the plaintiffs ; that a large portion of the growers of the upper country produce are their own carriers, and whoever arrives at this port with produce is presumed to be owner of it. A *bona fide* purchaser, under such a title, ought to be maintained in the property ; that there was no sufficient evidence to establish collusion or fraud between the defendant and Crawford, the seller, and that the purchaser was not in good faith."

The plaintiffs appealed, and the district judge has certified that the whole evidence appears on the record.

Stebbins Fisk deposed that he knew the bill of lading ; that it was to be given for the cotton sued for, which he knows to belong to King. Crawford, on his arrival, called at the plaintiffs' counting house, and offered to deliver the cotton as soon as he should find a birth. A year ago, last winter, he, Crawford, brought some tobacco, consigned to the plaintiffs.

East'n District.  
July, 1829.

M'NEIL & AL.  
vs.  
COLEMAN.

On his cross examination, this witness said, he never saw Crawford write, and does not know that the bill of lading is signed by him. He knows the cotton belongs to King, by the letters from Fisk & M'Neil to M'Neil, Fisk & co. : these houses being connected in co-partnership, and he knows it no other way. Crawford called several times on the plaintiffs; saying he could not land the cotton, because he was not able to come to the levee; that, when he landed the cotton, he would inform them. The two houses are composed of the same members, except the latter, of which Mr. Lesassier is a member.

Manning deposed that the cotton was brought to the house occupied by one Rust, on the batture, at the corner of the canal, at 9 A. M. accompanied by ten men, who had been arrested by the marshal, and a few days before discharged from prison. He knew the cotton to have been ginned at Cochran's gin, and communicated his suspicion that every thing was not right to Rust and Rogers, and would not have bought the cotton. It was put in a room in the lower part of the house, next to which was another used as a grog shop, and another in which were gambling tables. The upper part of the house is occupied by a bar, two billiard and gambling

tables. The house stands alone, directly on the river. When the cotton was brought the weather and roads were good, and it came from a considerable distance above.

East'n District  
July, 1820.

MCNATE & AN-  
DR.  
COUNSELLORS.

Rust deposed he was called upon by the defendant and another person, who said he was the owner of the cotton, the night before it was brought, and asked leave to store it, which he granted. With the cotton, came, besides the negroes driving the drays, ten men: he received the cotton as the defendant's, and held it subject to his order. He has frequently seen the defendant and Crawford, in company, at his house. The latter was generally considered, by the persons about the house, as engaged in the Mexican expedition, as well as several of the men who came with the cotton. The lower part of his house is occupied as a grog shop and gambling house, and is a place of common resort for boatmen. No cotton was ever before or since brought there.

Rogers was at Rust's, when the cotton came; he corroborates what he has deposed. His suspicions were excited by the appearance of things. He took down the marks and numbers of the bales: they correspond with the bill of lading annexed to the petition.

It appears to us that the district court erred.

East's District.  
July, 1820.

McNeil & al.  
vs.  
Crawford.

The plaintiffs ought to recover, if their allegations be uncontradicted or proven, unless some further fact be alleged and proven.

None of the allegations are contradicted; but it is alleged that no consideration was paid by King to Crawford, and that the transaction between them is a fraudulent one. Crawford is not alleged, or pretended, to be King's vender of the cotton, he is only known in this suit as the master of the boat, and nothing was to be paid to him but the freight, and that, not till after the delivery of the cotton to the consignee. There is not any proof of fraud. So that the plaintiffs' right to the cotton, as stated in the petition, is made out.

If the *bona fide* purchase of the cotton, alleged in the answer, was proven, it would be proper to enquire whether a sale by a common carrier transfers the property. But there is not any evidence of a sale, nor of any payment.

The defendant's counsel contends that the cotton must be presumed to be his client's, because it is proven that Rust received it as his, from a person who is not named, or whom he does not appear to know.

The cotton claimed, in the petition, is therein described by the marks and numbers of the

bales, in the margin of the bill of lading; and Rogers proves that the cotton brought to Rusts, had the same marks and numbers. The defendant has not denied any of the facts in the petition, but has relied on special pleas, which the evidence does not support.

Ward's History  
July, 1820.  
McNair & Co. vs.  
Coleman.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the plaintiffs, with costs in both courts.

*BETHEMONT vs. DAVIS.*

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. In this case, the plaintiff alleges that, having engaged his services, as a cook to the defendant, for a fixed space of time, he was turned out of defendant's house, before the expiration of that time, though he had faithfully complied with his obligations. The defendant denies the allegations of the petition, and further answers, that the plaintiff violated his contract by his improper conduct. Under such pleadings, the defendant offered to make proof

If the plaintiff aver a faithful compliance with his part of the contract, and the answer allege generally a violation of it, the defendant may give evidence of a breach.

East'n District.  
July, 1820.



BETHENONT  
vs.  
DAVIS.

of the particular acts by which the plaintiff had committed the alleged breach of contract. He was refused, and the reason given by the district court for such refusal is, that the defendant's answer does not mention any particular breach of covenant, nor any particular act of improper conduct, which the plaintiff could have been prepared to repel.

We think that, unless we are disposed to introduce in our practice the niceties of special pleading, the proof offered by the defendant ought to have been received. Under a denial that the plaintiff had faithfully complied with his obligations, the defendant surely could show how he had failed to comply with them. The parties were at issue on that general allegation and denial. The particular facts, on which the defendant might rely to support the negative of that general issue, were component parts of it, not special and separate grounds of defence. It is necessary, as we have already said, in the case of *Harvey vs. Fitzgerald*, that such certainty should prevail in pleading, as to put each party on his guard.<sup>27</sup> Therefore, wherever, a party attempts to introduce evidence in support of some ground of defence, distinct from those which are set up in the pleadings, such evidence ought to be refused. But, to re-

quire the suitors to specify in their pleadings the particular facts, out of which, the truth of a general allegation will result, would, we apprehend, be creating embarrassment, in the administration of justice, for no possible good purpose.

East's District.  
July, 1820.

BETHENOT  
vs.  
DAVES

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that this case be remanded to be tried anew, with instructions to the judge, to admit any legal evidence, which the defendant may offer to shew the particular act or acts, by which the plaintiff may have committed a breach of his contract with the defendant; and it is further ordered, that the appellee do pay the costs of this appeal.

*Preston* for the plaintiff, *Davesac* for the defendant.

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**BROWN & AL. vs. LOUISIANA BANK.**

**APPEAL** from the court of the first district.

**MATHEWS, J.** delivered the opinion of the court. This is a suit brought by the appellees,

Questions of fact which do not appear clearly to have been incorrectly decided in the court *a quo*,

East'n District  
July, 1820.

BROWN & AL.

L. BANK.

will not be  
touched in the  
supreme court.

(who were plaintiffs in the court below) against the bank ; to recover damages to the amount of a note of hand, set forth in their petition, on account of negligence and misconduct, on the part of said bank, by its officers, in not pursuing proper and legal means, for the collection of said note, by demanding payment from the maker, at the place therein expressed, &c.

The evidence in the cause shews clearly, that the demand of payment was not made, at the house designated in the note, but at another place. As an excuse for this change, in making the demand ; the testimony of the runner of the bank is given, to shew that it was made, in consequence of instructions from the plaintiffs, through their clerk ; who is also produced as a witness, and testifies to facts, directly contradictory to those established by the runner.

The testimony of these two witnesses, which is very important, in the decision of the suit, cannot be reconciled, and as credit is given to one or the other, so must be the judgment either in favor of the plaintiffs or defendants. The district court, before which the witnesses were heard, seems to have believed the clerk of the appellees ; and we can perceive no good reason to induce us to view the testimony in a different light, from that in which it was considered

by the court below. But suppose the contradictory facts, as related by these witnesses, are put entirely out of the question, on the principle of two equal and opposite powers, by destroying each other, being incapable of producing any effect; then it is clear, from the face of the note and other evidence in the case, not contradicted, that the demand of payment was not legally made; and consequently, that the bank is liable for its negligence and misconduct.

Eastern District.  
July, 1830.

BROWN & AL.  
vs.  
L. BANK.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court, be affirmed with costs.

*Morse* for the plaintiffs, *Moreau* for the defendants.

#### HARVEY vs. GRIMES & AL.

APPEAL from the court of the parish and city of New-Orleans.

DERBIGNY, J. delivered the opinion of the court. The plaintiff had instituted a suit by attachment against Robert Fitzgerald. Having obtained judgment in his favour, he caused execution to issue against the property attached,

Property, under an attachment, cannot be mortgaged by the debtor so as to defeat the attaching creditor's lien.

East'n District  
July, 1820.

HARVEY  
VS.  
GUTHRIE & AL.

but found it incumbered by a mortgage, given by the defendant, since the beginning of the suit. Could the defendant mortgage his property while attached, is the only question to be decided in this case.

Suits by attachment were, for the first time, established in this country by special law in the year 1805. Their object is to enable a creditor to obtain payment of his debt, even in the absence of his debtor, if he finds property belonging to him, within the jurisdiction of the court. The first step, in such a suit, is to lay hold of the property, and place it under the custody of the law, to await the judgment to be rendered. It is not indeed expressly said, that property thus circumstanced, shall not be disposed of by the defendant. But, was there any necessity to express it? Can the property be, at the same time, in the custody of the law and at the disposal of the defendant? If the property consists of moveables, it is evident that the defendant can neither sell or pledge it, because he cannot deliver it. Is the case different, with respect to immoveables, because they can be mortgaged without delivery? We think not. We think that the property placed in the custody of the law, must remain *in statu quo*, until released in the manner pointed out by

law, or disposed of according to law—that it is placed out of the reach of the defendant, until released; and that to suppose in the defendant a right to dispose of it, while in the custody of the law, is to make the whole proceeding on attachment a mere derision.

If not satisfied with the obvious meaning and intent of our law of attachment, we go in search of authorities to understand the nature of this kind of seizure, and the extent of its effects; we find in the Spanish laws, abundant information on the subject. A proceeding very similar to this formerly existed under the name of *asentamiento*. Part 3, tit. 8. When the defendant either refused to appear, or absconded to prevent a citation from being served on him, the judge ordered the plaintiff to be put in possession of so much of his property, as would suffice to discharge his debt. The defendant could, in like manner, release his property by appearing and giving security to abide by the judgment of the court. We do not find there, any more than in our laws of attachment, that property thus situated can be mortgaged to the prejudice of the plaintiff; but we see in law 5, of the said title, that any person who has the audacity (*osadia*) to take from such possessor the thing thus put in his pos-

Eastern District  
July, 1830.

HARRY  
20.

GREEN & AL.

East'n District  
July, 1830.



HARVEY  
vs.

GARNES & AL.

session is bound to return it and to indemnify the possessor, and is besides punished with fine.

Now, although it is not added in so many words, that the property attached shall not only be protected against any open violence, but also against any attempt to make it slip out of the hands of the creditor by other means, we think that the law fully embraces every act by which the debtor may contrive to defeat the object of the attachment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

*Hennen* for the plaintiff, *Livingston* for the defendant.

**CARTER & AL. vs. MORSE.**

A debt is liquidated, so as to be susceptible of being set off, when it appears that something, and how much, is due.

**APPEAL** from the court of the parish and city of New-Orleans.

**MARTIN, J.** delivered the opinion of the court. The defendant is sued as endorser of a promissory note, which was duly protested, and came to the hands of the plaintiffs, after its protest.

He pleads, among other pleas, as a set off, an account for professional services to the holders of the note, at the time of its protest, which is duly proven.

East'n District.  
July, 1820.

CENTER & AL.  
vs.  
MONROE.

The plaintiffs oppose the set off, on the ground, that the defendant's demand is *unliquidated*.

A debt, says Pothier, is liquidated when it appears that something is due, and how much. *Cum certum sit an debeatur & quantum debeatur.*

A contested debt, therefore, is not a liquidated one; and so cannot be set off, unless he, who claims to set it off, has the proof in his hands, and be ready to prove it promptly and summarily. 2 *Pothier's Obligations*, n. 174.

In this case, the demand does not appear ever to have been contested by the debtors: they were aware of its existence and refrained from demanding what was due to them, in the belief that their demand was discharged by the defendant's claim.

It is, therefore, ordered, adjudged and decreed that the judgment of the parish court be affirmed with costs.

*Preston* for the plaintiffs, the defendant in *propria personâ*.

East'n District.

July, 1830.

VICTOIRE &amp; AL.

vs.

MOULON.

VICTOIRE &amp; AL. vs. MOULON.

APPEAL from the court of the first district.

The proof  
must corres-  
pond with the  
allegation.

MARTIN, J. delivered the opinion of the court. The plaintiffs state that they had a judgment against Wiltz and Arnaud, and that having received from Arnaud, one half of its amount, they had an execution levied for the other on Wiltz's property, and the defendant prevailed on the sheriff, not to proceed therein, taking on himself and positively promising to pay the sum due, in the month of March following, whereupon the plaintiffs' counsel assented thereto; that soon after the said Wiltz died and the defendant, being appointed administrator of his estate, took possession thereof. Notwithstanding which he absolutely refuses to comply with his promise or to pay or satisfy the plaintiffs.

The defendant pleaded the general issue, denied that the sheriff seized any part of Wiltz's property, the whole of which was pledged to the defendant as a security for a very large debt, before the judgment of the plaintiffs was recorded; that the sheriff was informed of this, by the defendant; that if he promised to pay, he did so in his capacity of syndics of Wiltz's creditors.

George W. Morgan, the sheriff, deposed that when he demanded payment of the plaintiffs' judgment, the present defendant promised to pay it as soon as Arnaud came to town, and requested him to stay the execution on that condition. Some time after, he demanded payment and the defendant answered, he was advised not to pay, as he was not liable. The demand was made on the defendant, in consequence of the deponent being informed, that he had the slaves of Wiltz.

East'n District.  
July, 1820.

VICTORY & AL.

vs.  
MOULON.

It was admitted that Wiltz's property had since been sold by the defendant, as hypothecary creditor.

The plaintiffs introduced the execution mentioned in the petition.

The district court gave judgment for the defendant, being of opinion that "the *assumpsit*, if made, was made to the sheriff, who had no authority to receive it, and it was not binding on the defendant." Whereupon the plaintiffs appealed.

It appears to us, that the proof does not correspond with the allegation and is incomplete. A promise to pay, in March or April, is charged and evidence given, of one to pay as soon as Arnaud came; and it is not either shown or alleged that Arnaud ever came.

East'n District.  
July, 1820

VICTOIRE & AL.  
vs.  
MOULON.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that judgment of nonsuit be entered, and that the costs of this court be borne by the defendant and appellee, and those of the district court by the plaintiff and appellant.

*Seghers* for the plaintiffs, *Cuvillier* for the defendant.

GILLY & AL. vs. HENRY.

There is not any necessity of a case being set forth in the petition in various modes or counts, to authorize the plaintiff to offer proof, which supports his case in substance.

If the vendor refuses to take away the goods, the vendor, after proper notice may sell them for the account of the vendee.

APPEAL from the court of the parish and city of New-Orleans.

The petition alleged that the plaintiffs sold the defendant, one hundred barrels of flour, half fine and half superfine, at 13 dollars per barrel, then lying in their warehouse; that in order to accomodate him, they agreed to suffer the flour to remain there for a few weeks, and he promised to pay a part of the price in a few days after the sale (May 24, 1817) and the residue at, or before, the removal, which he promised to effect within weeks; that they frequently applied to him to remove

the flour, which he as often promised to do and which he utterly neglected, till a few days before the 31st of July, when he absolutely refused either to take the flour or pay the price; that they applied by letter to him (inclosing a bill for said flour) as appears by a copy of said letter and bill, annexed to the petition, warning him that, if he did not come forward, they would have the flour sold on his account; that he still neglected to come, and the flour growing daily worse, on account of the heat, they caused it to be sold at auction, and the net proceeds amounted only to \$408 81, which deducted from 1350, leaves a balance of \$953 66, including 12 50, for storage due them.

East'n District.  
July, 1820.  
GILLY & AL.  
vs.  
HENRY.

The defendant, in his answer, denied that he purchased the flour mentioned in the petition, and pleaded that if the plaintiffs ever did sell it, or any other to him, they lost their recourse in sacrificing it, by an unauthorised sale.

Dutillet deposed, that in May, 1817, he was a clerk to the plaintiffs, and on the 22d of that month, the plaintiff Gilly told this deponent to keep one hundred barrels of flour, from a parcel out of which he had sold one hundred barrels to Liddle, as he had sold that quantity to the defendant; that towards the beginning of June,

East'n District  
July, 1820.

GILLY & AL.  
vs.  
HENRY.

he went to the defendant with a note from the plaintiffs, desiring him to send them 500 dollars, in part payment of the one hundred barrels, spoken of, informing him they were at his disposal: that the defendant, having read the note, replied he had payments to make which prevented an immediate compliance, but he would pay the sum, in the course of the following week; that some time after, he handed the defendant a letter, a copy of which is annexed to the petition, which he returned unopened, observing he had nothing to do with the plaintiffs. Flour of the quality sold to the defendant, sold from 13 dollars, to 13 50. A fortnight after, flour fell considerably; in the latter part of June, it was at 9 or 10 dollars. The plaintiffs had that, sold to the defendant, disposed of at public auction.

On his cross examination, this witness added, that one M-Gowan, kept the plaintiffs' books at the time, and the entry, charging the defendant with the flour, is in the hand writing of said M-Gowan, who is now absent, and, as he believes, in England.

M'Clellan deposed that he was, at the same time, a clerk of the plaintiffs; the defendant went with the plaintiff Gilly into the back yard and on their return the latter told the deponent he

had sold to the defendant one hundred barrels of flour, and desired that they might be kept for him, out of a lot, from which Liddle lately had the same quantity. Those kept were of a superior brand. There were frequent applications made, and the quantity might have been sold several times, had it not been reserved for the defendant. Seven or eight days after, flour began to fall, and in June was down to 9 or 10 dollars. The quantity reserved was afterwards sold at auction, as it grew sour. The deponent tried to have a conversation with the defendant about the flour, but could not succeed; he would always evade it, and once particularly he turned off in a pet, saying something which the deponent did not understand. The deponent saw the defendant with the plaintiff, Gilly, looking at the flour.

It was admitted that on the 20th of May, 1817, the defendant was not indebted to the plaintiffs.

The auctioneer's bill and printed advertisement was read by consent.

Judgment was given in the parish court for the defendant, the judge being of opinion, that the testimony of Dutillet left no doubt that a sale had been agreed upon between the parties,

East'n District  
July, 1820.  
GILLY & AL.  
vs.  
HAWK.

East'n District  
July, 1850

GILLY & AL.  
VS.  
HARRY.

as is alleged in the petition : but, it appeared to him that the conduct of the plaintiffs was a bold step, without any legal authority ; that our laws provided for the vendors proper proceedings for redress by sequestration and provisional sale, if the article be of a perishable nature ; that their proceeding, without authority of justice, to the resale of the flour by auction, was unjustifiable. The plaintiffs appealed.

*Porter*, for the plaintiffs. Two questions present themselves to the court. Has there been a sale of the flour, made to the defendant ? If there was, had the plaintiffs a right to dispose of it at auction, as they have done, and charge the defendant with the loss ?

I. The evidence of Dutillet and M'Clelland establishes the sale beyond controversy. And really it is believed, that few cases of this nature could be more satisfactorily proven. What constitutes a sale ? A "thing sold, the price and consent." *Civ. Cod.* 344, art. 1. For proof of mercantile sales, "the non-controverted deposition of a single competent and credible witness may be sufficient," *id.* 340, art. 245. Let us then examine the testimony, to this point. It is admitted, as appears by the record in this case, that the defendant, on the 20th

of May, 1817, owed the plaintiffs nothing, that he is charged with the purchase of the flour in question, on the 21st of May, 1817, that on the day following, the plaintiffs directed Dutillet, their clerk, to reserve 100 barrels out of a certain parcel of flour, part of which he had sold to Liddle, observing, that he had sold the same to the defendant. That about the latter end of the same month, or the beginning of June following, Dutillet was sent by the plaintiffs, with a note to the defendant, requesting the defendant, to send them 650 dollars, *on account of the said 100 barrels of flour, before spoken of, and that the same was at his disposal in their warehouse, that is, in the warehouse of Gilly and Pryor.* That Dutillet handed this note to the defendant, who read it, and then returned for answer, that he had some cash to pay that week, on account of some purchases he had made, and could not then pay, but that he would pay in the week following. McClelland, also, a clerk of the plaintiff, stated, that sometime between the 20th and 30th of May, 1817, the defendant went with Gilly, one of the plaintiffs, in their back yard, where they had some conversation; that upon their return, Gilly told the deponent, that he had sold the defendant 100 barrels of flour, and directed him to keep the

East'n District  
July, 1820.

GILLY & AN.  
vs.  
HENRY.

East'n District  
July, 1820.



GILLY & AL.

VS.

HENRY.

same for the defendant, out of a certain parcel, which they had then on hand, in Canal street, next door to Liddle's; that the said one hundred barrels of flour, reserved for the defendant, were of a superior brand. Both witnesses declare, this flour would have been frequently sold, both at the time and some days after, for the same price charged to defendant, and even higher. That flour fell a few days after in value.

Can there then, it is repeated, be evidence, more conclusive, in a mercantile transaction of this kind, to establish the sale of the flour in question. Is it natural—might it not be said, is it not absurd to suppose, that the defendant being thus addressed by the plaintiffs, claiming \$650, in part payment of 100 barrels of flour purchased of them, should return the answer he did, if he had not made the purchase. And what inducement it may be asked, had the plaintiffs to reserve this flour, for the defendant, when they could, with facility, have disposed of it to others, at the same and perhaps, at a higher price, unless a sale was actually made to the defendant? The reason of the defendant not taking the flour is obvious; at the time he purchased, flour was scarce, and at a high price; he was a baker, and must have the article; a few days after, a

quantity of flour arrived in market and the article depreciated. But it may be said, admitting the purchase to have been made by the defendant, what was the price to be paid by him for the flour? In the first place, the defendant does not dispute the price, at which the flour is charged to him, 48 dollars, but contents himself by denying, that he ever purchased the flour in question; that the plaintiffs, by their sale of the flour, have lost their recourse upon him. Proving, therefore, a purchase (the price charged not being disputed) of the flour in question, would seem to be satisfactory evidence of the price at which it was sold: it ought to be conclusive. But, to go further, let us examine the testimony of Dutillet and M'Clelland upon this point. Dutillet declares "that the price of flour at the time, and of the quality of that in question was then from 48 to 48½ dollars. Flour was then scarce, and he could have sold it several times, at the same price that the defendant was to give for it, after the 22d of May, when he first understood it was sold to the defendant; that about ten or fifteen days after the sale made to the defendant, flour fell considerably in price; that the defendant is charged on the plaintiffs' books, with the flour, as stated in the account sued upon, as appears from the

East'n District.  
July, 1821.  
GILLY & AL.  
vs.  
HARRIS.

East'n District.  
July, 1820.

GILLY & AL.  
VS.  
HENRY.

witness' cross examination by the defendant's counsel.

M'Clelland declares, "that the 160 barrels of flour reserved by the plaintiffs for the defendant, were of a superior brand (Brown and Worthington) that at the time of the sale to defendant, flour were selling from 13 to 14 dollars; that at this time the plaintiffs had frequent applications for flour of this brand, but did not consider themselves at liberty to dispose of the flour in question, in consequence of the sale made to the defendant. It is, therefore, submitted whether the defendant, by his plea, not disputing the price charged by the plaintiffs, is not an admission of the price charged by the plaintiffs to be correct. But supposing that this should be no proof in favor of the plaintiffs to establish the price at which the flour was sold, is not the testimony of Dutillet and M'Clelland abundantly satisfactory to fix that price? Because it cannot be reasonably supposed, that the plaintiffs, when flour was in demand at from 13, 13½ to 14 dollars of the same description, would have sold it to the defendant under the market price, or if they had not previously sold the flour to the defendant, that they would have kept it on hand for the defendant, when they could have sold it for the same or perhaps a higher price.

It is not even probable that any man would thus act.

East'n District.  
July, 1820.

GILBY & Co.  
vs.  
Hawley.

Suppose the flour had been taken away by the defendant, and there was no other evidence of the price, than exhibited in the present suit, to wit: that flour, at the time it was sold to the defendant, of the same quality as that sold to the defendant, commanded, with facility, 13, to 13-1-2 dollars, and even 14 dollars per barrel, would not this evidence have been abundantly sufficient to entitle the plaintiff to recover? If such evidence would not be satisfactory, in what situation is the merchant placed, for it cannot be supposed that he can have at his elbow, in every sale he makes, a witness not only to the sale but price? It would be naturally and certainly reasonable to suppose, that the merchant proving the sale of a particular thing, notwithstanding he could prove no price agreed upon, should be entitled to recover the current price of the thing at the time it was sold. And this from necessity, because, one half of the bargains that take place in the mercantile world, are made between the vendor and vendee, without witnesses. And because, it is not to be supposed, that, an article would be sold under the current price it commanded in the market. And this is the rule adopted in practice in this

East's District  
July, 1820.

GILLY & AL  
vs  
HENRY.

staid. If A., sues B., on a bill of parcels for goods sold and delivered to him at a particular price, what evidence, under the practice of our courts, would be required of A. to recover of B. ? Proof that he sold the goods to B. and that the goods are charged at the current price : because, I repeat, it cannot be supposed, that an individual would sell his property under the current price. If he does so, it must be for the vendee to show it.

It is, therefore, confidently asserted, that the evidence in this case, established beyond questioning the sale of the thing in question and the price.

II. Had the plaintiffs a right to sell the flour on account of the defendant, and charge him with the loss on the resale ?

This is a question of law, arising upon the facts of the case, and thought to be too plain to require an argument. The plaintiffs required the defendant to remove the flour, or they would sell it at auction, on his account, and charge him with any balance that might result from such resale. The defendant neglected to remove the flour, the plaintiffs advertised the flour, sold it at auction, and charged the defendant with the balance, for which this suit is brought ; that he had

a right to do so, see 5 Part. 5, 24. *Carré* East's District  
*Pliff. Vente*, 46, 49. 5 *John. R.* 395 to 403, 4 July, 1830.  
*Esp.* 251. Ortiz, & Co.  
Harvey.

*Livingston*, for the defendant. The petition states a sale of 100 barrels of flour, half fine and half superfine, at 13 dollars per barrel, but declares that the object sold was not delivered, but *was ready for delivery*; and that there was a special agreement on the part of the sellers, that they would suffer the flour to remain a few weeks in their store; on the part purchaser, that he would pay a part of the price, after the purchase, and the residue when it should be removed, and that he would remove the said flour within weeks. This is the contract; the breach assigned is that the defendant refused to remove the flour and to pay for the same.

Here is a special contract set forth; first, on the sale, it is 100 barrels of flour, one half fine, one half superfine, for a certain price, 13 dollars per barrel. This then must be specially proven; here is no statement of a quantum sold, the plaintiffs have chosen to rely on a positive contract for a particular thing at a certain price; they must prove their allegation or they fail. What is the proof? The deposition of De-

East'n District.  
July, 1820.

GILLY *et al.*  
vs.  
HENRY.

tillet. He does not pretend to have been present at the contract. The plaintiffs, indeed, told him that they had sold the defendant 100 barrels of flour. I need not surely request the court to reject this part of the testimony; but even the plaintiffs did not tell him the price, nor did they speak to him of the description, *one half fine the other superfine*: on the contrary, they tell him to keep the 100 barrels out of *one parcel* such as they had sold Liddle. The only part of this testimony that can bear on the case, is the conversation that took place between the witness and the deponent, in the beginning of June. He says, he then "went with a note from the plaintiffs, requesting him to send by the deponent the sum of six hundred and fifty dollars, on account of the 100 barrels of flour before spoken of, and that the same was at his disposal in the warehouse of Gilly and Prior;" that the defendant read the note, and said he could not pay it, but would pay it the week following. This is the whole testimony, for the other witness, M'Clellan, only speaks of what he heard from the plaintiffs. Dutillet then knows nothing of the price, nothing of the terms of payment, and only testifies that the defendant, on being asked for the 650 dollars on account of the 100 barrels of flour, said he could not pay then, but

would pay in a short time. Now this reply is quite consistent with an inchoate as with a perfect purchase and sale. Suppose Gilly and Prior had offered the defendant 100 barrels of flour, on condition that he would pay them 650 dollars in cash, and the same other sum at a subsequent period, and that the defendant had only said, "if I like the flour, on further examination, I will take it," or "if I find it convenient to raise the money I will take it;" and they had sent him a note requesting the payment of the six hundred and fifty dollars and telling him that the flour was at his disposal." Might he not have made precisely the answer the witness states him to have made, and yet not have intended to conclude the bargain, further than he had done in the original conversation, that is to say, leaving it still conditional, that if he paid the money it should be a sale, but not otherwise. "I cannot pay this week, but I will the next;" if I do there is a sale, if not, I make no new contract. Now, if the evidence will admit of these two constructions, that most in favor of the defendant shall be taken; for the plaintiff must make out his case. But independent of this, the strong ground is that this testimony does not support the allegation in the petition; there is not the slightest evidence either

East'n District  
July, 1820.

GILLY & AL.  
vs.  
HARR.

East'n District. of the *description of the goods*, or of the price  
*July, 1820.*  
 or of the terms of payment.

GILLY & AL.

HENRY.

The allegation, relative to the agreement which is stated as forming part of the sale, that the plaintiffs would suffer the flour to remain a few weeks, and that the defendant would take it away in any given time, is totally unsupported by any evidence.

The allegation is, that the defendant promised to remove the flour in — weeks. How many, twenty, thirty or an hundred? There is no evidence to supply this blank, the defendant may fill it as he pleases, and if he inserts the word *ten*, the plaintiff has no cause of action; for the flour was sold in less than that time from the day of the pretended sale.

MARTIN, J. delivered the opinion of the court. The question of fact appears to us to have been correctly decided in the parish court. The plaintiffs have clearly shewn, by the testimony of Dutillet, and that of M'Clellan, that they sold one hundred barrels of flour to the defendant: and that flour of the quality sold was then worth 13 dollars per barrel. The defendant, on receiving the plaintiffs' note, by the hands of Dutillet, in which 650 dollars were demanded, as a part of the price of the 100

barrels of flour sold, but not yet delivered, to East'n District  
 have excused himself, and promised payment July, 1820.  
 in the course of the week then following. This  
 is clearly sufficient evidence, that a purchase of  
 one hundred barrels of flour had taken place,  
 and the defendant drew from the witness, in  
 the cross examination, the fact that M'Gowan,  
 another clerk of the plaintiffs, who was out of  
 the reach of the process of the court at the  
 time of the trial, had made an entry of the sale,  
 in the plaintiffs' books. Although the testimo-  
 ny shews a marked intention in the defendant,  
 to avoid paying the plaintiffs, it does not appear,  
 from any part of the record, that his counsel,  
 in the parish court, complained of an overcharge.

It is true, there is no evidence of the defen-  
 dant having expressly agreed to pay 13 dollars  
 per barrel, but it is shewn that this was the  
 fair and current price. The defendant has  
 not objected to evidence of the current price be-  
 ing received, and it does not appear, that any  
 question was raised in the parish court on this  
 head.

According to the mode of practice, in courts of  
 common law, the plaintiff who expects to avail  
 himself, in case of his inability to prove the  
 contract as it was really made, of the obliga-  
 tion which the law raises in the vendee, to pay

East'n District

July, 1830.

GILLY &amp; AL.

vs.

HENRY.

the fair price of the thing must have a count in his declaration, stating that the defendant promised to pay what the goods were worth, *quantum valebant*. In courts, in which the practice of the civil law prevails, the plaintiff does not produce his case in various forms, and evidence is admitted, when it supports the allegation in substance.

Here the petition states, that the defendant owes to the plaintiffs 1300 dollars, because they sold him 100 barrels of flour, at 13 dollars. Now, evidence that the defendant purchased from the plaintiffs 100 barrels of flour, which were really *bona fide* worth 13 dollars per barrel, substantially and perhaps literally, supports this allegation: if there be no evidence of a positive agreement at a specific price. If the defendant purchased flour, which was worth thirteen dollars per barrel, without any specific price being agreed upon, he impliedly purchased it at thirteen dollars.

That 1300 dollars were the amount of the flour, according to the intention of the parties, is corroborated by the circumstance, that part of the flour was to be paid in a few days, and the rest when it was taken away, in a few weeks; and the defendant, when in a few days after, he was called on for 650 dollars, expressed no

dissatisfaction at the demand. On such a contract, the parts mentioned not being defined, equal ones must be presumed to have been intended. If, therefore, the flour was sold at 13 dollars, the sum of 650 dollars claimed, as the first part of the amount, must be that which should be called for.

East'n District.  
July, 1820

GILLY & AL.  
vs.  
HENRY.

It is next objected, that the number of weeks, after which the last payment was to be made, is undefined—a *few* weeks. This mode of speaking is seldom used to denote a longer period than eight weeks, or fifty six days. The next period is usually described by the words sixty, ninety, or one hundred and twenty days—two, three, four or six months.

Upon the whole, we think, that the parish judge correctly decided the question of fact. But we think he erred in that of law.

We have in a case like this, a statute provision. *Part. 5, 5, 24.* When the vendee refuses to come and take away the goods, and the vendor has occasion for the vessels, in which they are contained, he has a right to hire others, and if none are to be had, after notice to the vendor, he may, after a reasonable time, let the liquor run in the street, or sell it to another.

*Habiendo la dicha mora o tardanza en el comprador, puede el vendedor vender las mercaderías*

East'n District  
July, 1820.

GILLY & AL.

vs.

HENRY.

*para sacar su pago del pracio y cobrar lo que se  
perda de el en ellas, del comprador.* Cur.  
*Phil. Venta, 49, Cur. Phil. ill. Venta, 46.*

So it is in England. In the case of *Martin vs. Addock*, 4 *Esp.* 251, lord Ellenborough decided that the vendor might recover the loss or difference of price arising on a resale, as well as damages for not taking away the goods, and that it was no objection to his recovery, on the general count for goods sold and delivered, that he had not the goods then ready to deliver.

Similar decisions have taken place, in New-York. *Hermanes & al. vs. Yeomans, & Johnson*, 403. *Sands & al. vs. Taylor & al. id.* 395.

The court there observed "that after the defendants' refusal, to come and take away the property (wheat) it was thrown on the plaintiffs' hands, and they were, by necessity, made the defendants' trustees to manage it; and being thus constituted trustees or agents, for the defendants, they must either abandon the property to destruction, by refusing to have any concern with it, or take a course more for the advantage of the defendants, by selling it. There is a strong analogy between this case, and that of the assured in the case of abandonment. In both cases, the party, in possession, is to be considered as an agent of the

other party from necessity, and his exercise of the right to sell ought not to be viewed, as a waiver of his rights on the contract. This rule operates justly, as respects both parties: for the reason, which induced the one party to refuse the acceptance of the property, will induce the other to act fairly, and sell it to the best advantage. It is a much fitter rule, than to require it of the party, on whom the possession of the thing is thrown against his will, and contrary to the duty of the other party, to suffer the property to perish, as a condition on which his right to damages is to depend.

Where a merchant orders goods from abroad, and they do not correspond with the order, he sells them, as the agent, and for the account of the shipper.

The parish court thought that the plaintiffs, in the case under consideration, might have prayed for a sequestration of the property, and, on showing it to be perishable, have obtained an order for the sale of it. In many cases, especially in that of an absent defendant, the delay and expences attending this mode of seeking relief, would leave but little to satisfy the claim of the vendor. We are of opinion that the parish court erred.

It is, therefore, ordered, adjudged and de-

East'n District,  
July, 1820.

GILLY & AL.  
vs.  
HARRY.

East'n District  
July, 1820



GILLY & AL.

vs.

HEWIT.

creed, that its judgment be annulled, avoided and reversed, and that the plaintiffs recover from the defendant, the sum of \$903 66, with costs in both courts.

**HOBSON & AL. vs. DAVIDSON'S SYNDIC.**

**APPEAL from the court of the parish and city of New-Orleans.**

If an agent sells goods, for which he takes notes, tho' the principal afterwards takes new notes payable to himself, with an extension of credit, there is no novation.

The vendor of moveable goods has a privilege on them while they remain in the possession of the vendee.

The plaintiffs stated that they sold, by J. K. West, their agent, a quantity of merchandise to the insolvent, to the amount of \$4313 57, according to the account annexed to the petition that \$2882 92, remain due, and a general sequestration has issued against his goods, which, accordingly, have been taken by the sheriff. Among them is a part of the goods sold by them; whereupon they obtained a particular and separate sequestration,

The defendant pleaded the general issue and denied that the plaintiffs had any privilege.

J. K. West deposed that on the 4th, 6th and 11th of November, 1818, he sold to the insolvent goods, according to the list annexed to his deposition, amounting to \$4313 57, on account of the plaintiffs, as their agent; that on the day of his deposition he examined eight pieces of swansdown, and found that the pieces

numbered 2061, 62 and 66, agree in the numbers and quantity of yards, with those in the invoice; that the numbers, in the pieces marked 63, 64, 70 and 76, agree with those in the invoice. He added he had also examined 19 pieces of velveteen cord and thickset, and compared them with the invoice and pattern card by which he sold, and believes them those sold by him to the insolvent; that he likewise examined two pieces of cassimere, no. 29187, and 22497, and found them to agree with the same numbers on the pattern card and invoice, and also three remnants, no. 24028, 22263 and 126 and found them to agree with the pattern card and invoice, except as to the number of yards. He also examined fourteen pieces of steam loom shirting; but from there being no mark or number on them or in the invoice, and the pattern card by which he sold them being lost, he cannot be positive that the pieces shown him are the same; but, on comparing the goods with the sterling cost of the invoice, he thinks they are. They are now in a case marked H. no. 91, in which they appeared to fit exactly, as if they were imported therein and it has the same mark as that sold by him. He also examined four pieces of toillinet, and found them to agree with the invoice and pattern card.

East's District.  
July, 1820.

HOBSON & AL.  
VS.  
DAVIDSON'S  
SYNDICS.

East'n District.  
July, 1820.

  
HOBSON & AL.  
VS.  
DAVIDSON'S  
SYNDIC.

There was judgment for the defendant and the plaintiffs appealed.

By the statement of facts, the parties admitted that the goods specified in the petition were sold by J. K. West to W. Davidson. The copies annexed to the petition are copies of the invoices given by West to Davidson. Payment was made in notes, as stated in a receipt given by West's clerk and annexed to the petition; and the plaintiffs took the notes annexed to the petition, which remain unpaid, in lieu of those given to West for the same debt; interest however was added in the last notes for the extension of the time of payment. That the goods sequestered are the same, as were sold by West to Davidson and the remnants of broken passage are also part of them.

The competency of West, as a witness, to be examined in the supreme court, as if there was a formal bill of exceptions,

*Hennen*, for the defendant. The judgment of the parish court is correct. The privilege claimed in this case is resisted on two grounds: No privilege ever attached on the goods sold, in favor of the plaintiffs; if any did, it has been lost.

1. The goods were sold by J. K. West in

his own name and as his own property to Davidson, without any mention of his acting as the agent of the plaintiffs. The notes were given in favor of West, and in his name; the receipt for the notes, taken in payment, was given.

East'n District.  
July, 1820.

HOBSON & AL.  
vs.  
DAVIDSON &  
SYNDIC.

By the Roman law no privilege existed in favor of the vendor of moveable property sold on a credit. The delivery to the purchaser vested in him an absolute right to the thing sold. *Pothier, Traite du Contrat de vente, nos. 318, 323, 3.*

The Spanish law is in concordance, in this respect, with the Roman law. *Part. 3, 23, 46. Curia Philippica, Prelacion, nov. 6, 7.* See, also, *Salgrado Labyrinth, credit, concur. Part 1, chapter 14, no. 78*, who quotes the opinion of above twenty doctors to the same effect. According to these laws, then, no privilege exists on the goods sold in this case on a credit to Davidson, even in favor of West: much less in favor of the plaintiffs, who wish to show that West acted as their agent, in a transaction in which he appears from the invoices and receipt to have been the principal.

But, it is said, the ordinance of Bilbao grants a privilege to the vendor (even in cases of goods sold on a credit) and that the laws of the *Partidas* have been thus far abrogated.

East'n District.  
July, 1820.

HOBSON & AL.  
vs.  
DAVIDSON'S  
SYNDIC.

The exact extent to which this ordinance has been introduced as law in this state, has never been ascertained. This court (4 *Martin*, 93) has declared it is not applicable to bills of exchange. Supposing, however, that the whole ordinance is law, the plaintiffs case will not be aided by it.

2. For, if there existed a privilege in favour of the plaintiffs, it has been lost.

The ordinance of Bilbao gives a privilege on the things sold, if the demand be made prior to the expiration of the credit. *Cap. 17, no. 37*. And as privileges must be construed strictly, the plaintiffs must bring their case within the very letter of the law. The same ordinance, *cap. 17, no. 34*, limits the privilege to six months after the expiration of the credit given to the purchaser; but in this case more than six months expired previous to the action.

There has been, moreover, a novation of the debt; new notes of hand were given, taken in the name of one of the plaintiffs, and the credit extended, by which, alone, their privilege would be destroyed. *Civil Code*, 296, art. 173 and 179.

As regards the remnants of the goods, no privilege, whatever, can ever be claimed. *Ord. Bilbao*, ch. 17. no. 35.

*Workman, for the plaintiffs.* The agency of West, in making the sale of the goods, in which the plaintiffs claim the vendor's privilege, cannot take away or diminish the rights of his principals. The making of the notes, given for the price of these goods, in the agent's own name, was conformable to the general course of the commission business. Were the notes made payable to the absent consignors, they could not be indorsed, nor consequently negotiated. But, by making them payable to the commission merchant, he can, if required, negotiate them and make his returns immediately.

The position, that no privilege exists on moveable goods, sold on credit, is incorrect. The contrary appears even from the authorities, cited by the defendant's counsel. According to the Roman law, the property of the goods sold is not transferred to the purchaser, even by delivery, unless the price of them has been paid or secured to the vendor. But it is held, that when a term of credit has been expressly agreed upon, the delivery, made in consequence of the contract, transfers the property to the purchaser. The counsel seems to have confounded the question of property, with the question of privilege. We do not dispute the point of property with the defendant. It is even a question

East's District  
July, 1830.

Hosmer & al.  
vs.  
DAVIDSON'S  
ESTATE.

East'n District  
July, 1820.

HOBSON & AL.  
vs.  
DAVIDSON'S  
EXECUTORS.

for our cause, that the property of the goods, should have been lawfully vested in the insolvent, in order that we might maintain our privilege in them. Our action is not to rescind the sale, but, admitting it to have been valid, to secure the price.

The provisions of the ordinance of Bilbao, (were they ever fully in force here) cannot contravene or modify the enactments of our own Civil Code. With respect to the remnants of pieces of cloth, linen, and the like, the 35th no. of the 17th chapter of that ordinance does, as the learned gentleman remarks, take away the privilege upon them. But the code requires only that the goods, in which the vendor's privilege is claimed, shall be in the debtor's possession, and in the same condition as they were when delivered. These words, in the last clause of the sentence, evidently mean, *unchanged in nature or kind*; unmingled with any thing from which they could not be separated, or by which their value might be affected.

The credit on these goods, having been renewed at the debtor's desire, cannot be said to have expired before the demand of payment was made. The greater part of the notes are still due; and this action is the claim for payment of the price. It would be most strikingly

unjust, absurd and preposterous, that the creditor should be put in a worse condition with respect to the debtor, or the mass of his creditors, from having extended to him a credit, equally beneficial to the interest of both.

East's District  
July, 1890.

Hoslow & Co.  
vs.  
DAVIDSON'S  
SYNDIC.

The sole question remaining to be examined is, whether the renewal of the original notes has effected a novation of the debt. That it has not done so, appears clearly from the judgment and the reasoning of this court in the case of *Cor. vs. Rabaud's syndics*, 4 *Martin's Reports*, 44. It is deemed unnecessary to re-examine a subject which in that case was so fully, ably and satisfactorily investigated, and decided.

DENMAN, J. delivered the opinion of the court. The plaintiffs claim a privilege on sundry goods, which were sold to William Davidson, an insolvent debtor, of whose creditors the defendant is syndic. The goods were found in the insolvent's possession, and there is no dispute about their identity.

The claim is resisted, on the ground, that the sale was not made by the plaintiffs, but by another person, to wit, John K. West, to whom Davidson had given in payment his promissory notes, which were subsequently replaced by other notes, subscribed directly to one of the

East'n District  
July, 1820.

HOBSON & AL.  
VS.  
DAVIDSON'S  
EXECUTOR.

plaintiffs: from this circumstance, it is argued that a novation has taken place, and that the privilege is lost.

It is clear, we think, that if a novation has taken place here, it must result from the substitution of one creditor to another. For the mere act of having received from the debtor other notes, at a longer credit than the first, would not, if between the same parties, produce a novation of the debt. If since the debt was contracted, says Pothier, in his treatise on obligations, no. 559, a new agreement has taken place between the creditor and the debtor, by which a longer time of payment has been given, or a new place for the payment appointed, or the debtor allowed the liberty of paying to another person than the creditor, or even by which the debtor should have bound himself to pay a larger sum or a lesser one, to which the creditor was willing to confine his demand; in all these cases and the like, according to the principle that the novation is not to be presumed, it must be decided that there has been no novation, and that the parties intended only to modify, diminish or augment the debt, rather than extinguish it, in order to substitute a new one to it, if they did not explain themselves. It is also the opinion of Merlin. *Rep. de jur. co. novation* § 5.

But was there a substitution of one creditor to another? John K. West, who has been heard as a witness, and against the competency of whose testimony nothing has been shown, has declared that in this transaction, he acted as the agent of the plaintiffs; the true creditors then of the price of those goods were the plaintiffs. When a prolongation of credit was granted for the payment of that price, one of the plaintiffs acted in person, and the notes were made payable to him. We do not see there a change of creditor.

We think that both by our civil code and the Spanish commercial law, often enforced here in that respect, vendors of moveable goods, unpaid for, retain a privilege on them, so long as they remain in the possession of the buyer.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be reversed; and proceeding to give such judgment as we think ought to have been rendered below, it is further adjudged and decreed, that the goods sequestered in this case be sold by the sheriff, and that out of their proceeds, if so much there is, the plaintiffs do recover the sum sued for; and it is further ordered, that the appellees pay the costs of this appeal, and that those in the inferior court be paid by the appellant.

East'n District  
July, 1820.

DAVIDSON'S  
STENOGRAPHY.

East'n District  
July, 1820.

DE ARMAS &  
WIFE  
vs.  
HAMPTON.

A judgment  
set aside by  
consent of the  
parties.

DE ARMAS & WIFE vs. HAMPTON.

DERBIGNY, J. delivered the opinion of the court. When this court on, a former occasion, 6 *Martin*, 567, was about to enter a final decree, directing the court below what judgment should be rendered between the parties, the court, at the instance of the parties, suspended the rendition of their decree, and entered the judgment of reversal only. And now, at this day, this cause being again called up by consent of parties, who, by their counsel, pray that the judgment of reversal be set aside, with the view to remand the cause to the court below, to amend the pleadings and bring new matter and evidence before the court, alleged to be important to the rights of the parties.

This court doth now, with the consent of the parties and under the circumstances of the case, order the reversal of the judgment of the court below, entered at a former term of this court, to be now set aside. And the court doth further more, on motion and with consent of the parties by their counsel, grant leave to the party appellant to withdraw his appeal.

*JBAT vs. POEYFARRE.*East's District  
July, 1826.

APPEAL from the court of the parish and city  
of New-Orleans.

ASAY  
vs.  
POEYFARRE.

The plaintiff obtained an order of seizure and sale of the defendant's property, which was suspended on the answer of the latter, who thereon put interrogatories, which were answered by the former, who on the next day, obtained a rule that the defendant shew cause, on the sixth day then following, why the order suspending the sale should not be set aside. On the return day, the rule was set aside, "the court being satisfied with the proof exhibited."

On a rule to show cause why an order suspending the sale of property taken on an order of seizure and sale, should not be set aside, the merits of the case cannot be gone into.

The defendant appealed, and the case was brought up on the agreement of the counsel of the parties, that the appeal was taken from the opinion of the parish court deciding this case, on the rule to shew cause, which point alone was submitted to the court.

*Grymes*, for the plaintiff. The parish court did not err. The defendant, in the *vis executiva*, must always be ready to maintain his opposition to the execution issued on a judgment, of which he cannot complain, since he has himself confessed it.

East'n District  
July, 1820.

ASAT  
DE  
POUJABRE.

In the present case, the defence rests on a fact, the knowledge of the plaintiff of certain circumstances which are alleged to give to the defendant some relief on principles of equity. He here probed the conscience of his adversary, without success. If he had witnesses, who may disprove the answer to his interrogatories, it was his duty to have them ready to depose, at the expiration of the period which was assigned him, and to have shown, by contradicting the plaintiff's answer, that the order which he had obtained to suspend the sale, was not to be rescinded. This he neglected to do. He showed no cause, and the order was, therefore, correctly rescinded.

*Pierce*, for the defendant. It is said that, in proceedings by the *via executiva*, the summary proceedings of the court *a quo* are authorised. Admitting that the laws of Spain do so, our mode of practice is exclusively our own, and the statutes regulating it embrace every possible case that may arise, and present to our tribunals the only legitimate rule of conduct.

The parish court, from which this appeal is taken, is governed, in its mode of proceeding, by the act of 1805, regulating the practice of the superior court, in which it is enacted that *all suits*

shall commence by petition, &c. ; that the day of appearance, when the defendant resides in New-Orleans, shall be on the 10th day after the service of the petition, when he must file his answer, &c. ; that the defendant may subjoin interrogatories to his answer, of the pertinency or materiality of which the court shall judge, and, if approved, shall order them to be answered by the plaintiff within a reasonable time ; which answer shall be received as true, unless disproved by the oath of two witnesses, &c. ; and that the defendant shall have three days, after the plaintiff's answer is filed, to except to it.

East's District  
July, 1820.



Agat  
vs.  
Postmaster

These are matters of every day practice, and the subsequent course is well known. After the answer to the interrogatories, and the three subsequent days, for excepting to it are elapsed, the cause is considered as at issue, and is placed on the docket in its order, and is called and fixed for trial in its turn, at not less than a week beforehand, when the parties come into court with their witnesses, and the cause is finally adjudged.

This statute, of 1805, applies to *all suits*, therefore, that one kind of cause should be distinguished and determined, in any manner different from all others, there should certainly

East'n District.  
July, 1820



ADAM  
VS.  
FOURBARR.

be some statute or law authorising it. What is said in our laws, or code of actions of seizure on titles, amounting to confession of judgment? They are not mentioned in our statutes; but our statute, *Civil Code*, 460, art. 40, directs, that when the title amounts to confession of judgment, the creditor may on his oath that the debt is due, obtain an order for an immediate seizure of the said thing. This is all that is any where said concerning them, and the reason of this privilege is obvious: as the title amounts to a confession of judgment, he shall be entitled at first to proceed as if he had obtained a judgment by process of law. But though the title, upon which he prays a seizure, does amount to confession of judgment, yet there may be many good grounds of defence, which would not so be considered, had the judgment been obtained in the usual way; because, then, all exceptions would have been previously put forth, discussed and adjudged upon. How is the defendant to come in with his opposition? The statute appears to have amply provided for such a case. The plaintiff cannot come into court in any other way than by petition, in this he prays that the property mortgaged may be seized and sold as upon a judgment. As the defendant has, in the eye of the law, confessed judgment, the judge

may legally order that the usual proceedings upon a judgment may be had forthwith, to wit : seizure, appraisement and sale. But, as the plaintiff is obliged to commence by petition so is the clerk obliged to issue a citation to the defendant to appear and file his answer. His property being seized and about to be sold he will, as may be supposed, be in haste to file an answer within the legal delay ; but as he has, as it were, confessed judgment, by the character of the title, which he has given to the plaintiff, is his answer to be admitted of course ? No, for then there would be no virtue in the title given. Yet, on the other hand, as he has not had the same opportunity of making his exceptions, as if judgment had been obtained after a trial ; as it is only on a title, amounting to a confession of judgment, that the demand is instituted, and the defendant may have numerous causes of defence, such as that the debt is not yet due, and subsequent release, fraud, or, as in this case, an imperfect title. It must be left to the discretion of the judge, in examining his answer, to determine, if he has a good defence, and to admit his answer, if it contains sufficient grounds, and is supported by affidavit ; but this discretion, can only be exercised, as to admitting or refusing the answer

East's District  
July, 1820.

Asst  
to  
Prothonotary

East'n District  
July, 1820.



ABAT  
VS.  
PORTERRE.

*in toto*, it cannot be halved or quartered, he cannot admit the answer, and order it to be proven, in less than the usual and legal term. If he does admit the answer, he brings the case within the statute of 1805; it is no longer a proceeding as upon confession of judgment, it is a *suit* between A. and B., as any other on the docket, and its course of proceeding, must hereafter be the same. By admitting the answer, the judge has said, as if in so many words, that there is sufficient cause, shown to him, why this title should not be considered as a judgment, entered up against the defendant; for if he did consider it as such, he could not admit any answer, as it would be palpably a contradiction, there would be a *contestatio litis*, and a judgment existing at the same time, between the same parties and for the same thing.

Again, the defendant had by law a right to except to the answer of the plaintiff, at any time, within three days? Can the cause be considered as at issue, until these three days have passed by? And can the cause be fixed for trial, before it is at issue?

And if it could be fixed for trial, at the discretion of the judge, and out of the usual course, could it be, by a rule taken upon the defendant, to show cause, why the order sue-

pending the order of sale, should not be set aside? Was this a rule, upon which to decide the merits of a cause, and finally adjudge it, if it could be adjuged at all, by any rule. If the petition or answer had required a jury, would the clerk have been authorised on such a rule being taken, to issue a *venire* to the sheriff, to summon a jury thereon. Even in the summary, mode of proceeding under the Spanish law, it may be required within the delay of ten days allowed, that each party should explicitly notify the other, a *comparoitre, pour voir presenter, connaitre, et affirmer temoins, &c.* O'Reilly's instructions, 10, art 7, no. 7.

But this rule was taken upon the defendant, merely concerning the suspension of the order of sale, which he had obtained upon giving sufficient security, which if it had been rescinded, and the sale taken place, would in no way affect the merits of the cause, after being once at issue. It might proceed, notwithstanding the sale, through to the injury of the defendant.

The defendant, therefore, avers: 1st. That his answer having been admitted, the cause is at issue, and must hereafter proceed, as all suits are directed to proceed by our statutes.

2. That if it could be called up out of its course, it could not be, before the three days,

East's District  
July, 1830.

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Attest  
Clerk  
of the District  
Court.

Buck's District  
July, 1880.

ARAY  
vs.  
PORTFARRE.

allowed to the defendant to except, had expired. 3. Nor could the merits be decided, upon a rule to show cause, why an order suspending an order of sale, should not be set aside, as this question was every way foreign to the merits of the cause.

MARTIN, J. delivered the opinion of the court. The answer presented an issue for trial, and the defendant, on the plaintiff's answer to his interrogatories being filed, had three days to except to it as insufficient. 2 *Martin's Digest*, 162.

The issue was to be tried, in the same manner as issues in ordinary cases, and either party was entitled to a jury. Whether such cases are to be set down for trial, in their turn among all others on the docket, we find it unnecessary to determine; but, the law having made no provision for any other mode, the case must be set down for trial.

The present does not appear to us, to have been set down for trial. A rule to show cause why an order, suspending a sale, should not be set aside, is obtained when the plaintiff thinks it irregularly issued. On the argument, the merits are not enquired into, any more than on a rule to shew cause why an attachment should

not be set aside. *Taylor & al. vs. Hood*, 2 Mar-  
tin, 113. The grant of the order alone is con-  
sidered, and it is clear that the opinion of the  
court does not put an end to the suit, if the or-  
der be not set aside. The case must, then, be  
doubtless, be set down for trial on the merits.  
If the order be set aside, it being the opinion of  
the court that it was irregularly obtained, it is  
done without pronouncing on the merits, as  
in the present case, on the validity and force  
of the proof.

Admitting that the rule to show cause was (as  
being directed to be tried summarily, and as such  
perhaps entitled to a preference) according to  
the plaintiff's counsel, a correct mean to set down  
the cause for trial, this was done prematurely.  
The defendant had two days farther to except  
to the answer to interrogatories and the case was  
not ripe for trial.

It is, therefore, ordered adjudged and de-  
creed, that the judgment of the parish court be  
annulled, avoided and reversed, and that the  
cause be remanded with directions to the court,  
to proceed to hear the merits of the cause, after  
it shall have been set down for hearing, and it  
is ordered that the plaintiff and appellee, pay  
the costs of this appeal.

Eastern District,  
July, 1820.

BERNARD & AL. vs. VIGNAUD.

BERNARD & AL.

APPEAL from the court of the first district.

VIGNAUD.

A tutor's liability is not prevented by his neglecting to take the oath, give security, &c.

A farther-in-law is an incompetent witness.

The judgment obtained by a minor against his tutor, is evidence of his claim on the tutor's property, sold to a third person.

The petition stated that, at the time of the death of the plaintiffs' mother, they were minors and one Joseph Fouque took upon himself to act as their tutor and curator *ad bonam*, and not only assisted as such at the inventory of her estate, but took possession of the plaintiffs' estate, to the amount of \$5000, which he received from the testamentary executor; that he never rendered any account, but afterwards failed, and the syndics of his creditors have paid the plaintiffs a part of the said sum, which leaves a balance of \$3581 89 due them, for which they have judgment against the said Fouque; that they have a legal mortgage therefor, from the 7th of December, 1810, when he made the first act of administration of the plaintiffs' property; that at that time, he was possessed of twelve slaves, which he afterwards sold to the defendant, by an act under private signature, bearing date June 23d, 1811, which was not recorded till the 9th of July, 1812, wherefore, they prayed, that the said slaves, now in the possession of the defendant, may be seized and sold, to satisfy their claim.

The answer denied that Fouque ever acted as tutor or curator *ad bonam*, as stated in the po-

tion. It averred that he borrowed from Vallio, Each District  
July, 1820 executor of the plaintiffs' mother, 2000 dollars, on a mortgage of a house, which the executor BERNARD & CO.  
VIGNAUD released on receiving other security, on the 30 of June, 1812. It suggested that the negroes mentioned in the petition were never affected by any tacit mortgage, that no such mortgage was ever recorded. The defendant further pleaded a judgment in his favor against Fouque's syndics.

At the trial the plaintiffs introduced, as evidence, the record of the suit in which they recovered judgment against Fouque, and a certified copy of the inventory of their mother's estate.

Briere deposed, that from the records of the court of probates it does not appear that Fouque ever presented himself to be confirmed as tutor, or curator of the plaintiffs, or had letters therefor.

The signature of Fouque, at the foot of the inventory, was admitted.

The defendant introduced the will of the plaintiffs' mother, the record of the proceedings of Fouque against his creditors, and the record of the case of Fouque's syndics vs. Vignaud, the present defendant.

At the trial, the defendant offered Fouque as a witness. He was objected to, as incompetent, being the defendant's father-in-law. The ob-

EAST DISTRICT.  
July, 1820.

BERNARD & AL-  
DR.  
VIGNARD.

jection was overruled, and the defendant took his bill of exceptions.

In an act passed before a notary, Fouque declared that, as tutor and curator of the plaintiff, he was indebted to Vellin, executor of the mother, in the sum of 5000 dollars, which he had borrowed from the executor, and had bound himself to pay, in about nine months, and mortgaged sundry slaves therefor.

The district court gave judgment for the defendant. It observed, that "the executor is charged with the administration of the estate, and is responsible for its misapplication. It is his duty to make an inventory, and if necessary, to sell the property, and he is accountable for every thing that comes to his hands. The duties of a tutor are principally confined to the person of the minor. A loan by the executor, of the monies of the estate, gives no lien on the estate of the borrower : and there is no difference in the principle, whether the loan be made to a person, styling himself tutor, or any other individual. That this loan to Fouque must have been made for his individual benefit, appears from facts and law. It is evident, from the fact of his obliging himself to return the money, which would not have been the case, if it had been intended for the use and benefit of

the minors. It is evident from the law, because the tutor cannot borrow for the minor, nor enter into any transaction or compromise, without the authority of the judge. *Civil Code*, 70, art. 68. Nor could he lay it out, in the purchase of any property for the minor, *Id.* art. 72. In this case, it is considered, that the loan, made to Fouque, was for his personal use and benefit, and not for that of the minors, and gives no lien on his property. For it, he is responsible to the executor of the latter, who is charged with the administration of it, is alone accountable to the heirs." The plaintiffs appealed.

East's District  
July, 1820.

BERNARD & AL.  
VS.  
VIGOR.

*Seghers*, for the plaintiffs. The plaintiffs are the children of Catherine, lately widow Bernard, in her life time a merchant at New Orleans. At the death of their mother, which happened sometime in or about the month of December, 1810, they were all minors; one of them (John Anthony) became of age shortly before bringing this suit; the others are still minors and are assisted by their curator *ad lites*, lately appointed for that purpose.

Their mother, by her last will, appointed Joseph Fouque their tutor and curator *ad bona*, together with Joseph Vellio, and the latter her testamentary executor.

East's District  
July 1820.

BERNARD & AL.

VIRGANE.

Vellio took out letters testamentary, and acted as executor up to the 2d of July, 1812, and afterwards.

Neither Fouque nor Vellio did ever take out letters of tutorship or curatorship, nor caused their appointment to be confirmed; nor caused any other tutor, or curator, *ad bona*, to be appointed.

Vellio made, on the 7th of December, 1810, as executor, an inventory of the estate, amounting to 6600 dollars, the greater part of which was cash.

This inventory was made with the intervention of Fouque, who assisted thereat as tutor and curator *ad bona*. It was made under private signature without the intervention of any person but two appraisers. On the 15th the inventory was filed in the office of the register.

The defendant states that Fouque borrowed from Joseph Vellio, the executor of the mother of his minors, a sum of 5000 dollars; for which he gave a mortgage on a house and lot: that afterwards, on the 3d of June, 1812, Vellio gave an acquittance and discharge of this mortgage, on receiving other security; and, in an affidavit of his on record, the defendant also informs us that Vellio, as testamentary executor, lent to

Fouque all the money of the estate, and took security therefor; first on the house of Fouque, and afterwards his personal security by endorsed notes.

Mass's District  
July, 1820.

BREARD & AL.

VERMOREL.

In a notarial deed between Fouque and Vellio, on the 2d July, 1812, Fouque appears as tutor and curator, and declares himself indebted to Vellio, as executor, in the sum of 5000 dollars, belonging to the minors; and in the same deed undertakes to repay Vellio; in March, 1813, gives him to that effect his endorsed note, and a mortgage of sundry slaves for greater security; the mortgage was then recorded.

On the 2d of January, 1813, Fouque surrendered his property to his creditors. At their meeting, 6th of February, 1813, Vellio appeared as tutor of the minors. This is the first time that he assumes that capacity, and the only instance in which he appears as such. The syndics having sold the slaves mortgaged to Vellio, or so much of them as they could reach, paid the proceeds of the same to the plaintiffs in two instalments, 1st \$1265 62½, and 2dly 150 dollars, which left a balance, due by Fouque, of \$3594 37½, independently of the interest.

For this balance and interest, the plaintiffs recovered judgment against Fouque, as their tutor and curator. The plaintiffs, in their peti-

East'n District.  
July, 1820

BERNARD & AL-  
vs.  
VIGNAUD.

tion claim a legal mortgage, from the 7th of December, 1810, on all the real property and slaves, of which Fouque was possessed, at that time or since, for all the sums, which have come to his hands during his tutor and curatorship.

It is in evidence, that on the 7th of December, 1810, Fouque possessed a house, sold to Harang in June, 1813, by a notarial deed, and twelve slaves, sold to the defendant, by a deed, under private signature, bearing date, June 22d, 1811, and which was afterwards, recorded on the 11th of July, 1812.

On those twelve slaves, the plaintiffs have brought their hypothecary action, for the recovery of the amount of the judgment, rendered against Fouque, in the former suit; the defendant, who is the third possessor under Fouque, opposed their demand, and judgment having been rendered for him, the plaintiffs appealed.

They rest their claim on the following grounds:

1. Fouque having acted as their tutor and curator, without having been legally authorised as such, and having intermeddled (*s'étant immiscé*) with the administration of their property, they have a legal mortgage on his property, from the day he made the first act of that ad-

ministration. *Civil Code*, 457, art. 20 and 23. East'n District,  
July, 1820.  
71, art. 75; 75, art. 82; 453, art. 15.—*ff.* 27,  
3, 25, *cod. lib.* 5, 1. § 1.—*Cod.* 5, 45, 1 & 2. BERNARD & AL.  
VIGNAUD.  
*Domat*, tom. 1, fol. 182, no. 45.—*Pothier*,  
*traité de l'hypoth.* chap. 1, art. 3.—*Partida* 5,  
13, 23.—*Febrero*, *Adicion.* 2, 3, 3, § 11, no.  
51 & 53.

2. This legal mortgage lies, not only for all the monies belonging to his wards, which have come to his hands, but also for the interest thereon, at the rate of five per cent. per annum, from the time he has received such sums respectively. *Civil Code*, 71, art. 71.—*ff.* 27, 5, l. 1, § 8.

3. The tacit mortgage, lies on the property of Fouque, because he has received and wasted the monies of his wards; it does likewise lie for his responsibility, if, without having ever received any part of the monies, he has, by his neglect or contrivance, suffered them either to remain unsecured in the hands of the executor, after the time of his executorship had expired, or to be then lent out, by the executor, to any body else who should afterwards have failed; because it was his duty, at the expiration of a year, to wit: in December, 1811, to compel the executor to render his account. It was likewise his duty to take care that the balance belonging to the minors should be safely collocated; and by fail-

East'n District.  
July, 1830.

BERNARD & AL.

vs.  
VIGNAUD.

ing to perform that duty he became liable for the subsequent insolvency of the executor, as well as for that of the borrower. *Civil Code*, 69, art. 52; 74, art. 75. *ff* 27, 3, 1; *eod. lib.* 5, 4, 9, l. 4; 26, 7, 15. *Damat*, 1, 179, no. 23. *Ferrière, Dict. de Pratique*, 2, 731, verbo *tuteur*, 3 *Ancien Denisart*, 297, verbo *tuteur*, nos. 69 and 61.

It is to be observed that the defendant does not deny any of the facts alleged in the petition; but confines himself to the following points: 1. That Fouque never acted as tutor or curator *ad bona*. 2. That he borrowed 5000 dollars from Vellio, the executor of their mother, and gave a mortgage on a house and lot, which was afterwards released by Vellio on receiving other security. 3. That the slaves purchased from Fouque by the defendant, never were subject to mortgage. 4. That a judgment has been rendered in his favor in relation to the property in the said slaves between him and the syndics of Fouque, and is, therefore, *res judicata* against the plaintiffs. 5. That their legal mortgage not having ever been recorded, can have no effect against him.

I. The first point fails on the mere inspection of the two documents in evidence, viz. the in-

ventory and the deed passed before the notary on the 2d of July, 1820; in both of which he assumed the character of, and acted as tutor and curator.

East'n District.  
July, 1820.

BARNARD & AL.  
Att'ys.  
VINCENNES.

To this the counsel for the defendant objects that the assistance of Fouque, at the inventory, was not an administrative, but merely a conservatory act, and that thereby no tacit mortgage accrued.

It is certain, however, that without the intervention of a tutor, no inventory could have been made; that this was the only act the tutor had to perform at that period, and that, had he been legally appointed, his administration would have begun by that act, and stopped there till the expiration of the year of the executorship.

Now the tutor could not assist at the inventory unless duly appointed by the judge; and it is from the very day of that appointment that the tacit mortgage attaches, *Civil Code*, 71, art. 75. We have already shown from the authorities above cited, and chiefly from Pothier, that intruders are not entitled to greater favor than legal administrators.

II. It does not appear at what period the money was borrowed; whether during the year of the executorship, or after its expiration; but

East's District.  
July, 1820.

BERNARD & AL.  
vs.  
VIGNAUD.

I beg leave to observe that the question as to the first point being once settled, it follows that Fouque, tutor of the minors, borrowing their money from their deceased mother's executor, whom it was his duty to controul, and afterwards receiving from him, at a period when his executorship had certainly expired, a release of the mortgage that was to secure that loan; it follows that, in such circumstances, Fouque cannot but be suspected of having intended, either with or without connivance on the part of the executor, to defraud his wards of that money, which constituted their inheritance, and with the preservation of which he was entrusted. Is it not to guard against such fraudulent practices that the law has secured to minors that legal and tacit mortgage, which lies on the property of the perpetrator of such acts, and affords to his victims a relief against such a flagrant abuse of his legal or assumed character?

Here it is no idle observation that from the very outset of the transaction, the mind of Fouque seemed bent on the means of defrauding his wards; for, by acting without the authorisation of the judge, he could have no other intent than to avoid giving security for his administration as directed by our *Civil Code*, 59, art. 55, and 75, art. 82.

III. The statement of the case, together with the authorities cited in support of the first ground, is sufficient to defeat the third objection.

East'n District.  
July, 1830.

BERNARD & CO.  
VS.  
VIGNAULT.

IV. The defendant states that the judgment alluded to, is in relation to the property in the slaves, and this is an hypothecary action upon the same slaves; thus the two actions are distinct and of a different nature. Besides, the plaintiffs were not parties to the suit alluded to, nor were the syndics of Ponque anywise qualified to represent them; thus this is moreover, as to the plaintiffs *res inter alios acta*. Therefore, there is no occasion to plead on this head the *res judicata* in bar of this action. The court will be convinced of the correctness of these observations, by the inspection of the suit, the record of which, is admitted as evidence.

V. The fifth ground of defence will be answered by our *Civil Code*, 455, art. 15, 457, art. 27 and 28; and by the act of March 26, 1813, directing tacit mortgages to be recorded; and by the 3d section whereof, the tacit mortgages in favor of minors, are expressly dispensed from the formality of the recording.

East'n District  
July, 1820.

BERNARD & AL.  
VS.  
VIGNAUD.

Were it admissible for the plaintiffs to leave the strong ground they have taken, for one far weaker, it would be intimated that even then this fifth point, would not in fact prevail. For the deed by which Fouque, acting as tutor and curator, acknowledges to have received 5000 dollars, belonging to the minors, was executed before a notary, and recorded on the 2d of July, 1812, and it was only nine days afterwards, on the 11th of the same month, that the deed of sale of the slaves from Fouque to the defendant was recorded. But, it is contended, that the legal mortgage of the plaintiffs existed against any one claiming under Fouque, as well as against Fouque himself, without the formality of the record.

The preceding observation as to the day, on which Fouque received the money of his wards, would also apply, if necessary, to the objection made by the defendant's counsel in support of his first point, to wit : that assisting at the inventory was not an administrative act ; for, receiving their money was certainly such an act in the meaning of the law. And should even the legal mortgage lie only from that date, it would yet be nine days anterior to the title of the defendant, as it has been just now demonstrated.

But, it is said, this deed of the 2d July, 1813, is but a loan of money from the executor to Fouque. It is true, that the borrower appeared as the tutor and curator of the minors, and acknowledged that the monies were theirs, but in the first place, in assuming that character, he styles himself tutor and curator of the minor and major children, &c. which latter part destroys the idea of a tutor or curatorship; and in the second place, the responsibility rested entirely on the executor, who was answerable for the misapplication of the estate. The judge *a quo* held that the duties of a tutor are principally confined to the person of the minors. A loan by the executor gives no lien upon the estate of the borrower, and there is no difference in the principle, whether the loan be made to a person styling himself tutor, or to any other individual. Then he goes on to show that it is evident both from fact and law, that this loan to Fouque was made for his personal use and benefit, and not for the use and benefit of the minors, and gives no lien upon his property; that for this sum he is responsible to the executor and that the executor, who was charged with the administration of it, is alone accountable to the heirs.

In addition to this reasoning of the judge,

East'n District  
July, 1830.

HERVARD & AL.  
OF  
VIEWARD.

East'n District  
July, 1820.



CHAND & AL.

VS.

VIGNAUD.

the counsel for the defendant contends that Vellio having been designated together with Fouque, as tutor, by the mother of the plaintiffs and having appeared as such at the meeting of Fouque's creditors, it is to him and not to Fouque, that they must look for their money, as he alone is responsible for it in either capacity; for he alone has administered it and disposed of it.

I shall now proceed to shew, how groundless are those reasons alleged, by the defendant's counsel; and that the judge erred in his decision on the question; that there is no lieu upon the estate of the tutor.

I am first, to dispose of the objection as to the two-fold capacity of executor and tutor in Vellio. It is true, that he was designated for both by the will; but from the evidence in the cause, it appears that from the outset, he had made his election, by taking out testamentary letters, and by acting in the sole capacity of executor. It will be observed, that in this instance, the duty of an executor, was incompatible with that of the tutor; because the executor being accountable to the heirs, and the tutor representing the heirs, it was the duty of the latter to controul the former; thus it was only after the executor's administration was at an end,

and his account settled, that he could have been appointed tutor to the minors. In fact, we find in the proceedings of Fouque against his creditors, which are in evidence in this case, that Vellio, for the first and only time, styles himself tutor, after Fouque's failure, and at the meeting of his creditors in 1813, and that he there claims the \$5000; as being due to him in the capacity of tutor. Now, if this act of Vellio, subjects him to a legal mortgage, it would lie only from that date, (1813) when there was nothing left to the minors, Fouque having got the whole of the estate, and when, therefore, there was nothing left for the tutor to administer.

EAST'n District.  
July, 1820.  
BARNARD & AL  
VS.  
VIGNAUX.

Reverting to the other arguments of the counsel for the defendant, and to the reasoning of the judge, we observe, that the irregularities of the words, *tutor and curator of the minor and major children, &c.* which are to be found in the notarial deed, cannot prejudice the plaintiffs, who were not parties to it, and who are not to suffer for the connivance of the parties, or the ignorance of the notary. But the nature of the thing shews by itself, that by the word *minor*, the notary meant the minors, under the age of puberty, and by the word *major*, those above that age. The facts in the cause, which are not

East'n District  
July, 1920.

BERNARD & AL.  
vs.  
VIGNAUD.

denied by the defendant, shew that the plaintiffs were then all minors.

I demonstrate by the deed, that Fouque was still acting as their tutor and curator, and that he received their money. This is all I ought to prove, to make him liable to repay. It cannot be said, that he was in the same position, as another borrower; for it was a duty incumbent upon him, to oppose the loan, and to compel the executor to settle his account, and to pay the money of the minors, that it might be safely disposed of, for their own benefit. I have shewn, that it was his duty to do so, and that he would be still liable, even had he not been himself the borrower. With how much more reason, then, shall he be held, when neglecting, misusing the sacred trust, which a dying friend had entrusted him? When instead of protecting his wards, we find him deceiving their mother's executor, conniving with him, and using every fraudulent practice, to despoil them of the little fortune, laid up for them, by the labour and industry of their parents!

I do not contest what the judge has said, that a loan, made by an executor, gives no lien upon the estate of the borrower. But he travels out of the question, when he says, that there is no difference in the principle, whether the loan be

to a person, styling himself tutor, or to any other individual. To have drawn such a conclusion, he must have overlooked the grounds taken by the plaintiffs, and even totally disregarded their third and last ground, together with the authorities quoted in support of it. The duties of a tutor, says he, are principally confined to the person of the minor; but, that does not lessen his duties as to the conservation of the property. And he forgets that Fouque was also curator, and that the duties of a curator are principally confined to the property of the minor. Nay, as to the preservation of that property, the duties are the same.

An appeal to law and fact seems quite unnecessary to prove that, on which we all agree, viz: that it was for his personal use and benefit, and not the use and benefit of the minors, that Fouque borrowed their money. But, we are at a loss to make out upon what principle is founded the conclusion drawn by the judge; that therefore, this loan gives no lien upon the property of Fouque. He was their tutor; he ought to have received and safely collocated that money on their account. Is he less liable for having diverted it to his own use? Has he not in fact received and pocketed or wasted the money? To maintain, by such reasoning, that

East'n District  
July, 1830.

BERNARD & AL.

VS.  
VIGNAUD.

Eastern District  
July, 1820.

BURNARD & AL.  
VS.  
VIGNAUD.

Fouque is only responsible to the executor for this sum, that the executor was exclusively charged with the administration of it, and is, therefore, alone accountable to the heirs, is exactly granting to Fouque what, from the beginning, he intended to procure, by his fraudulent practices, viz. to avoid any lien on his property, and thus to deprive the plaintiffs of any effectual relief and confine them to a nugatory one. (1)

Indeed, what would avail their recourse against Vellio? He is worth nothing. This is a fact, 'tis true, not in evidence; but that he has left the country, for Cuba, is a fact stated by the defendant himself in his affidavit on record in the cause.

When the judge positively asserts that the executor was exclusively charged with the administration of the money, he forgets that at that period (2d July, 1812) the legal period of executorship had expired for six months and upwards, and that it was the duty of the tutor and curator not to allow him any further administration, but to have the estate settled, and the balance paid and safely collocated.

It is not contested that the plaintiffs, as heirs to their mother, have at all events, an action against Vellio, as her executor; but, that action gives them no lien upon his property,

even if he had any. As minors, they have a lien on the property of Fouque, their tutor and curator. It follows, that they have both remedies, and thus the election is theirs. In this position shall they be forced to abandon their first, direct and effectual remedy, in order to look to a secondary, circuitous and delusory one?

EAST'S DISTRICT,  
July, 1839.

BARNARD & AL.  
ATTORNEYS.  
VIRGIL.

I have a single observation to make on the bill of exceptions, on the refusal to admit the testimony of Fouque.

Fouque is the father-in-law of the defendant. It is contended that the law which excludes the father from being a witness for his son, is as applicable to the father-in-law as to the natural or legitimate one. As the principle of exclusion is on account of interest, it is contended that the wife of the defendant, who is the witness's daughter, has a like and indivisible interest with the defendant in the event of this suit; for she is in community with her husband, and the value of the slaves form a part of the common stock, which by the event of the suit is either to be left entire or to be lessened by the whole amount of the mortgage. That the slaves are a part of the common stock, is in evidence; for in the suit alluded to (the record of which

East'n District.  
July, 1820.

BERNARD & AL.

VINAUD.

has been introduced) it is proved that they were already married, for a long while, and living with Fouque, when he sold the slaves to the defendant.

*Livingston*, for the defendant. Joseph Fouque and Vellio are appointed tutors of the minors Bernard, by their mother's will. Neither of them take out letters of tutorship, or take the oath and give the security required by law. Vellio is, also, named executor and detainer of the property by the same will.

Fouque, however, signs the inventory and in the caption of it he is called tutor ; but he never received any part of the estate (otherwise than by the loan hereafter mentioned) nor did he intermeddle with the administration of the property, the whole remaining in the hands of Vellio, the executor and also named tutor by the will. On the 2d day of July, 1811, Fouque borrowed \$5000, part of the estate of the minors for which he gave his promissory note secured by an obligation before a notary, &c. a mortgage of several slaves for the payment to Vellio, in this instrument he is called tutor of the minor and major children of Mrs. Bernard. In January, 1813, Fouque becomes insolvent, Vellio appears as a creditor for the 5000 dollars, and swears to

the debt as tutor of the plaintiffs, and as such receives a dividend. For the deficiency of this, suit is brought against Vignaud, who, on the 22d of June, 1811, purchased 12 slaves from Fouque, under the supposition that, Fouque being the tutor, his estate is mortgaged for the amount of the plaintiff's claim, that this mortgage accrued from the time Fouque first signed the inventory, or at least from the time he received the money, the 2d July, 1812, which was 7 days before Fouque's deed, to Vignaud was recorded.

Earl's Digest  
July, 1808

REBEARD IS AN  
OP.  
VIGNAUD

First, it is stated that the tacit mortgage took place from the time that Fouque signed the inventory as tutor. The law gives this mortgage on the estate of the *tutor* from the day of his *appointment*. On the estate of those who, without being tutors, take upon themselves the *administration of the minor's property* from the day when they made the first act of *that administration*. *Civil Code*, 456, art. 19, 20.

Now Fouque was never *tutor*, he had been named in the will, but he had done none of the requisites to complete his appointment. He had taken no oath, given no security, obtained no confirmation from the judge, procured no under tutor to be appointed: all this is required by the code. He was not, therefore, a tutor, and therefore there can be no mortgage attached to his

East'n District.  
July, 1820.

BERNARD & AL.

VS.  
VIGNAUD.

property as such. Nor can he be liable to any of the consequences to which a tutor would be liable, as such. Has he taken upon himself the administration of the minors' property?

The only two acts he has done in relation to them, are the signing the inventory, and secondly the borrowing a sum of money from the executor for which he gave special security and a note. The assisting at the inventory is clearly not an *administration of the property*, it is merely a preparatory act to such administration. Which administration was clearly intended to be made by the executor Vellio. He retained the property; he was authorised to retain it by the will, he *administered* it; that is to say he possessed and disposed of it for the use of the minors. If I understand the term; it implies exclusive possession, and that no man can administer that which he does not possess. Now Fouque never possessed, never used, he consequently did not administer. The signing the inventory is, therefore, not an act of administration.

The borrowing of the sum of 5000 dollars, can (it appears to me) as little as the signing the inventory, be construed into an act of administration. It shews on the contrary, as strongly as any circumstance can shew, that *Vellio*

administered or he could not have lent them. *See's Deed*  
*July, 1830.*  
 Fouque *did not* administer or he would not have  
 been under the necessity of *borrowing*, and *Bankard & al.*  
 giving security, for that which he himself *Verdict.*  
 could dispose of, if he had really adminis-  
 tered.

Fouque, therefore, was neither tutor, nor has  
 he *administered* as tutor: therefore, there is no  
 mortgage accruing to the plaintiffs, on his pro-  
 perty.

A number of authorities are quoted to prove  
 that Fouque was liable for neglect, in not calling  
 on Vellio to account, after the year of his ex-  
 ecutorship expired: to this there are two answers,  
 one of which has been anticipated. Fouque  
 was never the tutor. The other is that, suppo-  
 sing him to be a tutor, Vellio was equally so,  
 and he, Fouque, had no right to call him to ac-  
 count.

But, suppose the mortgage to have accrued,  
 from the day Fouque received the money, I  
 think it will not much avail the plaintiffs. He  
 borrowed the money on the 2d of July, 1812;  
 but Vignaud had bought the negroes on the 22d  
 of June, 1811, by an act under private signature.  
 But, it is said that this act, being registered only  
 on the 12th of June, 1812, is to take effect only  
 from that day, which is subsequent to the mort-

East'n District.  
July, 1820.

BARNARD & AL.  
vs.  
VIGNAUD.

gave, arising from the receipt of the money. The code, on this subject, says that the acts under private signature, shall have effect from the time of their registry only *against third persons*. The third persons must be such as have acquired an interest, in consequence of the acts being not found on the register, which they would not have taken, if they had had notice by the registering; but suppose, in the present instance, that Vignaud's deed had been recorded before the 2d of July, would Vellio not have lent this money to Fonque? Certainly he would, for he took only a special, not a general mortgage. Therefore, this case is not within the reason of the law, and it cannot apply, even if there be a mortgage, which, I trust, I have shown there is not.

Another objection to the plaintiffs' recovery is, that they have not described the property specially mortgaged by Fonque. It is true, that they say (and perhaps, it may be so stated, on the tableau of distribution of Fonque's estate) that some of the negroes were dead, and others were previously mortgaged by Fonque. Yet, these facts ought to have been proved to the satisfaction of the court, more especially, as the existence of the prior mortgage, on the slaves is inconsistent with the certificate

which the register of mortgages must have given, when the negroes were specially mortgaged by Fouque to Vellio. I pray the court to examine the tableau of distribution with a view to this point.

East's District  
July, 1820.

BERNARD & CO.

Attorneys.

It appears, also, by the notarial act made by Fouque to Vellio, that this and the mortgage it contained was only a collateral security for the payment of a negotiable promissory note, which is not produced. Fouque, and still less an innocent purchaser under him, cannot be adjudged to pay so large a sum, without the production of the security that was given for it; besides, this note was indorsed, the indorser, therefore, is liable and ought to have been called on before the innocent purchaser, or, at any rate, that purchaser, if he be obliged to pay, ought to have the benefit of a subrogation to all the rights of the contracting party. Now, one of these rights would have been that of suing the indorser, as well as the drawer of the note; but how can he have this, unless the note be produced?

I pray the court to remark, during the whole of this discussion, that the plaintiffs consider Fouque as incurring the responsibility of a tutor because *he acted as such*; but the law has no such provision. A man may do an hundred acts, that none but a guardian could properly do,

East'n District.  
July, 1820.

BERNARD *vs.*  
VIGNAND.

and yet not subject himself to the responsibility of one, or impose a tacit mortgage on all his property. It is only when he takes upon himself the administration of the property, that these effects ensue, and, by a natural consequence, only to the amount of the property that he administers. He may take care of the person of the minor; he may educate him, give his consent to his marriage, do any thing in short relative to him, provided he does not administer the property as tutor, and in behalf of the minor. In this case Fouque has done neither. He signed the inventory, which is not an act of administration; he borrowed money, for which he gave a note and security to the common form, which is still less an administrative act, and this is all. And for this, a bona fide purchaser of his property, an industrious father of a family is to be utterly ruined by a tacit mortgage, which could not have been discovered, by the most scrupulous research. For, if Vignand, when he made the purchase, had gone to the probate office to enquire whether Fouque had taken upon himself any charge that would have this effect, the answer would, undoubtedly, have been "no, he is named tutor for the minors Bernard, but he has never accepted, he has not been sworn, he has not given security, his nomination has not been

confirmed, and the administration of the property is still in the hands of Vellio, the executor, who was also named guardian of the minors." If, not satisfied with this, he was to go to Vellio, he would certainly tell him the same thing; that Fonque had not administered the property, but that he had borrowed a sum, for which an indorsed note and mortgage had been given, as it would have been by any other borrower. This account would certainly have satisfied the most scrupulous that there was no risque, and until the ingenuity of the plaintiffs' counsel was applied to the subject, none of the parties interested, saw in the transaction any thing but a common deed secured by special mortgage. Vellio considered it so, when he proved the debt, Fonque when he put it on the bilan, the syndics when they made the dividend, the plaintiffs when they received it.

East'n District  
July, 1830.

BERNARD & AS  
VS  
VIGORAN

Should these cursory reasonings fail to prove that the plaintiffs can have no relief on the merits, let us then have recourse to the exception for the rejection of Fonque's testimony. He was offered as a witness for the defendant; but was rejected, because of a supposed interest, arising from his connection with the defendant, who married his daughter,—because the exclusion of the father to be a witness for the son ex-

East'n District tends to the father in law. Neither of these  
 July, 1820. are believed by the defendant to apply.

BERNARD & AL.

VS.

VIGNAND.

First, as to the interest, in order to exclude it must be direct or indirect, *Civil Code*, 312; but it must be an interest a *certain* not an eventual one. Direct interest is a gain that will accrue, or a loss that will be avoided, to the witness, by the *immediate* operation of the judgment in favor of the party who produces him: as if he is to receive part of the money recovered, or would be liable to pay the costs or part of the sum, if he lost; an indirect interest is where the advantage or loss is more remote, as if the verdict to be obtained by his oath could be used in another suit for the witness, or the loss of the suit in which he testifies would give rise to another action against him. But whether direct or indirect, the interest, in order to exclude, must be apparent, it must not be eventual; and thus this court decided in the case of *Hewes vs. Lowe*, where the witness might receive a benefit from the judgment, yet as this was not certain, he was not excluded. Now, what is the interest of Fouque. His daughter is the wife of the defendant: if the plaintiff recovers, the community between her and her husband will be lessened. If the community is lessened, and if Mrs. Vignand dies without children, then

Fouque, if he survives her, will inherit so much less from his daughter's estate: here are certainly too many contingencies to create an interest. And we accordingly find that this species of expectancy in another's estate, is not, by the law, considered as an interest either direct or indirect; for, after establishing that criterion (direct or indirect interest) it proceeds to exclude expressly the ascending or descending heirs. Now, if they had an interest, they would have been excluded by the general provision. It is clear, therefore, that the law did not consider them so, and before the code they were always admitted in our courts, while interest alone was the rule of exclusion under the territorial law.

It remains then to be considered, whether the exclusion of the father extends to the father in law. There is nothing to shew this; on the contrary, the exclusion being an express one, in derogation of the general rule, must be taken strictly. All persons are good witnesses who are of full age, not infamous, not interested, and who do not come within the enumerated relations to the parties. Here the witness is not within either. He is therefore a competent witness. The interest of the wife, even if that were of any consequence, is here gratuitously asserted. She may, or may not be in

East'n District.  
July, 1820.

BERNARD & AL.  
VS.  
VIGNAUD.

East'n District  
July, 1820.

BERNARD & AL.  
vs.  
VIGNAUD.

community with her husband : that depends on contract. Or, if it should be presumable, in marriages contracted here, yet, it does not appear where she was married. All this ought to have been proven by the plaintiffs, is necessary to support the objection. Besides, the wife has no interest in the case properly : until the dissolution of the marriage, the husband is perfectly master of it, may spend, dissipate, or throw it away, as he pleases.

The objection, arising from Fouque being the vendor was not urged by the plaintiffs on the trial ; nor, is it mentioned in this court. Had the objection been raised, all doubt would have been removed by a release. But, there is no doubt Fouque is perfectly indifferent. He is insolvent, and the plaintiffs have accepted his cession. And again, if Vignaud should lose the slaves, they would be applied to the payment of his, Fouque's debts : so he is interested in the decision against us, and this action of warranty, would be barred by his cession. At any rate, if personally responsible on such warranty, he can be so, for no more than the value of the negroes ; and the full amount of that value would, in that case, go to the discharge of his debts. So that he stands, in this view, perfectly indifferent between the parties.

*Seylers*, in reply. It is erroneously asserted that Vellio, received a dividend from the syndics of Fouque. These syndics have not paid any dividend; the ordinary creditors have not received any thing, and some mortgage and privileges are left unsatisfied. The syndics have paid only to privileged and mortgage creditors, the net proceeds of the sale of the objects specially affected to the respective mortgages or privileges, as far as those proceeds would go. This was not received by Vellio, but by the plaintiffs. This fact is set forth in the petition, not denied by the answer, and admitted by the defendant at the end of his argument on the merits. It was paid to J. A. Bernard, the eldest of the plaintiffs, whom, though not of full age, the syndics did not hesitate to trust with that payment.

The defendant maintains that Fouque never was tutor, though he was named in the will and had, in that capacity, assisted at the inventory. In support of this position he states that *Fouque had done none of the requisites to complete his appointment*; here he makes the enumeration of all the duties required from a tutor by the code; and because Fouque has willfully failed to comply with those duties, he was, says he, therefore, not a tutor, and therefore there can

East'n District  
July, 1820.

BERNARD & AL.  
vs.  
VIGNAUD.

*be no mortgage attached to his property as such, nor can he be liable to any of the consequences to which a tutor would be liable as such; as if Fouque, or his assignee, could be admitted to plead his own wrong. On the contrary, is he not within the principle laid down by Pothier, where he says that intruders are not entitled to greater favour than legal administrators?*

The defendant further urged that Fouque did not take upon himself the administration of the minors' property, because he has done only two acts in relation to them, viz.: signing the inventory and borrowing their money. He forgets that we have it from himself, both in his answer and affidavit on record, that between those two transactions, many other took place between Fouque and Vellio in relation to the money of the minors. He goes on and says that Vellio retained the property as executor and that he was authorised to retain it by the will; that he administered it and disposed of it; that the signing of the inventory was not an act of administration; that Fouque never was the tutor, and if so, that Vellio was equally tutor and that Fouque had no right to call him to account.

I think I have satisfactorily established that the signing of the inventory, in the manner that Fouque has done, is an act of administration,

because that inventory could not have been made without the intervention of a tutor, and if legally appointed, the lien would have affected his property from the day of his appointment, though during the year of the executorship he would have had no other act of administration to perform, than that of attending the inventory. The executor, it is true, was authorised by the will to detain the property ; but by law he was bound to give it up at the expiration of one year, and it was the duty of the tutor to enforce that provision of the law ; and if he continued to administer and dispose of it, after that period, it was wrong in the tutor to suffer it, and he or his assignee can certainly not be admitted to be benefited thereby. I have likewise proved that Vellio was no tutor, having made his election, and that, therefore, Fouque alone was tutor ; and that even if Vellio had also been tutor this trust would have been suspended during his executorship, as being incompatible with it ; and therefore it is clear that Fouque had not only the right to call him to account, but that it was his bounden duty so to do.

The defendant next takes a new ground and maintains, 1st. that the special mortgage, mentioned in the deed of July 2d, 1812, must be first discussed ; and, 2d, that the note, also

East'n District  
July, 1820.

BERNARD & AL.  
vs.  
VIGNAUD.

East'n District. mentioned in the same deed, must be produced;  
 July, 1830

*for, says he, at any rate, if the purchaser be  
 obliged to pay, he ought to have the benefit of a  
 subrogation to all the rights of the contracting  
 party.*

BRENNAN & AL.  
 VIGNAUD.

In reply I shall first observe, that neither of those grounds have been urged in the court below, where even he would not have been admitted to urge them, as they were not pleaded, and that thus the plaintiffs could not have come prepared to meet them. I therefore maintain that it is now too late, that the court cannot listen thereto; but even admitting (which I by no means do) that they could now be pleaded, it would be very easy to shew that they cannot avail the defendant.

In the suit against Fouque and his syndics in which we have recovered the judgment on which this action is brought, and the records of which is in evidence in this cause, we have set forth the manner in which the several slaves mortgaged were disposed of, to wit: that some were dead, and others were subject to the privilege of the vendors for the amount of the price for which they were sold to Fouque; and that the net proceeds of the sale of the remainder were paid to us by the syndics; these facts were not denied; they are confirmed by the tableau of distribution filed by Fouque's syndics, which ta-

bleau has been introduced as evidence in this case by the defendant; for there the syndics after having sold every property surrendered by Fouque, apply the proceeds of each to the privilege or mortgage to which it was subject; and there it appears that no other proceeds were applied to this special mortgage than those which we have accounted for in our demand. And if this ground had been pleaded, it would have been easy to introduce at the trial any further or collateral evidence to establish those facts.

It is asserted that the certificate of the recorder of mortgages mentioned in the act of the 2d July, 1812, excludes the presumption of any of the slaves being subject to other charges. We contend that this certificate proves nothing against the privilege of the vendor, in as much as the sale may have been made by private instrument, and afterwards recorded before a notary. If it appears on the face of the instrument that the price be due, the privilege lies without needing to be recorded with the register of mortgages. *Civil Code, 470, art. 75, 488, art. 68.*

The same observations apply to the production of the note; for it is to be presumed that it was delivered by Vellio to the syndics of Fouque, because had they not been satisfied on

East'n District  
July, 1820.

BERNARD & AL.  
VIGOR.

East'n District.  
July, 1820.

BERNARD & AL.

VS.  
VIGNAUD.

this subject, they would not have paid us the proceeds of the property mortgaged, to secure the payment of said note.

Besides, we shall remark, that the minors were no party to the transaction between Vellio and Fouque, when the latter received their money ; that the note never came to their possession, and therefore, they cannot be held to produce the note : when the defendant will have discharged their claim, he will of course be subrogated by the operation of the law to all their rights both against Fouque and against Vellio, and shall therefore, be entitled to claim the note if he thinks proper, in whosoever hands it may be.

One of the grounds relied on by the defendant, and on which he much insists, is the want of recording our tacit mortgage. I have nothing to add on this subject. But, having stated that at all events, this mortgage would lie from the 2d of July, 1812, because Fouque on that day received the money, and the tacit mortgage was on the same day virtually recorded, by recording the deed, executed before Quinones, in which the capacity of tutor and curator was clearly set forth ; and having stated also, that this was anterior by nine days to the recording of the sale of the slaves from Fouque to Vig-

naud : the defendant endevours to prove by the reason of the law, that the date of his private deed of sale, which is the 22d of June, 1811, and not that of the recording which is the 11th of July, 1812, must prevail against the plaintiffs, as they are not those third persons whom the code had in view, when its provisions on that head were enacted.

Barb. Dec. 1830.  
July, 1830.

Barb. Dec. 1830.  
VIENNA.

Those provisions are clear, they admit of no exception, and however ingenious the argument of the defendant's counsel on this subject may be, we will confine ourselves to quote the statute in reply, which provides "when a law is clear, and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit." *Civil Code*, 4, art. 13.

The defendant remarks, that during the whole of this controversy, we consider Fouque as incurring the responsibility of a tutor, because, he acted as such ; and he asserts that the law has no such provisions, and here he enumerates many acts which he pretends that a man may do without incurring that responsibility. He forgets that he has himself maintained that Vellio, for having done one of these acts (in 1813, after Fouque's failure) had incurred that responsibility which he now endeavours to throw from Fouque, pretending that these ef-

East'n District  
July, 1820.

BERNARD & AL  
VS.  
VIGNAUD.

facts enque only when one takes upon himself the administration of the property. Here the compliment of ingenuity well may be returned to the defendant's counsel; for in truth, his argument is a very ingenious one; but what can it avail the defendant? Does it go any way to disprove the fact of Faigue's having received the money of his wards, when he styled himself their tutor; and when in fact, he acted as such? Again, shall he, or his assignee, be admitted to take advantage of his own wrong, in violating every duty which the law imposes on him, and designedly employing the circuitous means of a loan, in order to avoid that very responsibility from which the defendant's counsel in vain attempts to exonerate him? "He signed, says he, the inventory, and borrowed the money; this is all." We do not conceive what he could have done more. For by this, he got the whole of his minors' estate; and if a consideration of the nature of the one set forth by the defendant, could prevail on the court, we would beg leave to lay before them the situation of unhappy orphans despoiled of their whole fortune by the very man to whom their dying mother entrusted them, and against whose fraudulent contrivances they were utterly defenceless. It is to guard against such abuses, that those benevolent

lent laws have been enacted, which we invoke, and think it the duty of the court to enforce.

East'n District,  
July, 1820.

BERNARD & AL.

VS.  
VIGAUD.

Of what can the defendant complain? He lived in the same house and family with Fouque, and had thus an opportunity of knowing that he was entrusted with the tutorship of the minors. Had he inquired at the probates' office, he would there have been informed that Fouque had intervened in that capacity, at the inventory of their mother's estate; had he gone to the recorder of mortgages, on the 11th of July, 1812 (the only legal date of his conveyance), he could likewise have known there, that Fouque had acted as their tutor, and released \$5000 of their money, on the 2d of the same month.

It is asserted, that none of the parties interested in the transaction any thing but a common debt, secured by special mortgage. Vellio, says the defendant, considered "it so, when he proved the debt; Fouque, when he put it on the bilan; the syndics, when they made the dividend, and the plaintiffs, when they received it." This assertion, we most positively deny.

If Vellio was not deceived by Fouque, then he thought surely that he was entrusting the money to the tutor of the minors; and if he connived at this transaction, then he, as well as

East'n District  
July, 1820.

BERNARD & AL.

VS.

VIGNAUD.

Fouque, and the latter at any rate, saw in it what it effectively was, the means of possessing himself of the monies of his wards, without incurring the legal responsibility. As to the syndics and the plaintiffs, they saw and could see nothing in it, but the one paying and the other receiving what was legally due. Moreover how can the acts of Vellio, Fouque, or the syndics affect the rights of the plaintiffs? As to their own act, they received the money on account of their claim, and this is all. It will, certainly not be seriously contended, that thereby they renounced their legal remedy to recover the balance. On the exception to Fouque's testimony it is pretended, that the exclusion of the defendants does not extend to a father-in-law; that the community, between the defendant and his wife is not proved, as it does not appear where they were married, that the objection of Fouque's being the vendor, was not made on the trial, nor is it mentioned in the record, that Fouque is insolvent, and that the plaintiffs have accepted his cession.

This last point is denied; the plaintiffs could neither accept nor refuse his cession, being minors, nor did they accept: that Fouque is the vendor, I asserted at the end of my argument; the fact appears throughout the record, and need

and therefore be argued, to enable the court to apply it either to the merits or the exceptions in the cause.

East'n District.  
July, 1820.

BERNARD & AL  
VS.  
VIGNAUX

The case cited of *Hewes vs. Lauve* does not apply. The community need not be proved, because it is presumed by law; nor is it material where the defendant and his wife married: for when a married couple emigrate from the country where their marriage was contracted to another, the laws of which are different, the property which they acquire, in the place where they have moved, is governed by the laws of that place. *Gates vs. Davis' heirs, & Martin*, 419. On the first point, I will confine myself to a single observation. Marriage is prohibited between ascendants and descendants. Would it be lawful, to marry one's mother-in-law?—If not, the principle applies to the evidence.

#### ROWLETT vs. GRIEVE'S SYNDICS.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff, a merchant of London, was a partner in trade with Samuel Corp, a

A partner, who pays partnership debts, is subrogated to the creditor's rights, on the joint property.

\*The opinion of the court, in this case, is not printed now, the time for the application for a rehearing having been extended by consent, and not being expired when this sheet was put to press.

East'n District  
July, 1830.

ROWLETT  
vs.  
GUINNE'S SYNDICATES.

merchant of New-York. They traded in London, under the firm of Rowlett & co., and in New-York, under the firm of Samuel Corp alone. In the year 1799, Rowlett and Corp for their joint concern the ship Chesapeake, richly loaded, which Corp sent to New-Orleans, consigned to one Samuel Watson, afterwards superseded in this agency by George Pollock, who was himself succeeded in it by John Grieve, of whose creditors the defendants are syndics. At the expiration of the agency of Pollock, part of the proceeds of the cargo of the Chesapeake, consisting of outstanding debts, some of them secured by mortgage, and a certain plantation, in the parish of New Orleans, bought with the said proceeds, were delivered by Pollock to Grieve. Grieve, having afterwards become bankrupt, put all that property in his bilan as his own, and the object of the present suit is to recover it from his syndics.

It appears that Corp, independently of his connexion with Rowlett the plaintiff, was a partner of the mercantile house of Corp, Ellis & Shaw, of New-York, with whom Grieve had dealings; and that Grieve, being a creditor of that house, pretended to apply Corp's particular property to the payment of that debt. But Grieve, as the successor of Pollock in the agen-

cy of the business of Corp and of Rowlett, must be presumed to have known that the proceeds of the Chesapeake belonged to that concern; neither could he be ignorant that Rowlett, on the expiration of his partnership with Corp, settled and paid all his debts, and was of course subrogated to the rights of the creditors of that partnership on the joint property. But, whether he knew it or not, the fact being that the property here claimed is the proceeds of the Chesapeake's cargo, belonging to the concern of Corp & Rowlett, and subsequently to Rowlett alone after payment of the debts of that concern, and there being no evidence that Grieve was induced to make any advances to the house of Corp, Ellis, & Shaw, from a belief that he held in his hands property belonging to Corp, as a kind of pledge or security, the property claimed must go to its real owner, William Rowlett.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

*Smith* for the plaintiff, *Livingston* for the defendants.

East'n District.  
July, 1890.

PATTERSON  
& AL.  
vs.  
M'GAHEY.

PATTERSON, & AL. vs. M'GAHEY.

APPEAL from the court of the first district.

A factor has  
a lien, on the  
goods of his  
principal in his  
hands, for the  
general balance  
of his account.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs attached 44 bales of cotton belonging to the defendant Daniel M'Gahey, proved their debt and obtained judgment; but Wm. Fitz, to whose possession the cotton was, claims to be paid, in preference to the plaintiffs, the amount of his account of advances to M'Gahey.

It appears that, since the month of September, 1819, a course of commercial dealings were carried on between Fitz and M'Gahey; Fitz selling him goods on credit, and paying his drafts, and M'Gahey sending him cotton from time to time. Fitz's books show that he sold that cotton for M'Gahey's account, and carried the amount of sales to his credit; and that, at the time when the attachment took place, a balance of three thousand three hundred and fifty-three dollars, and eighty nine cents, were due from M'Gahey to Fitz. There can be no hesitation in saying that between men thus connected, whether they are viewed as principal and agent, or as creditor and debtor, property so situated must be considered as liable to the payment of

the advances made from one party to the other. *East'n District  
July, 1820.*  
It is a principle of the law-merchant, settled by repeated decisions, that the factor has a lien upon the goods of his principal in his hands, for the general balance of his account; but when the factor, being the creditor of his principal for advances already made, receives from him a consignment of produce for sale, that principle applies with particular force; for such consignment is evidently a remittance. For the balance then, which was due to Fitz previous to the attachment, we say that he has a right to be paid out of the proceeds of the cotton consigned to him. We have not been able to ascertain whether the account last produced, purporting to be for acceptances by him made, on account of the cotton, is included in the account taken from his books, though we presume it must be. The objection raised by the plaintiffs against the production of that account, we think, without foundation; the claim of Fitz comprehending the advances made on the cotton, distinctly from the general balance as per account annexed.

It has been contended that whatever lien Fitz had on the 44 bales of cotton, he has lost it by taking a mortgage on sundry slaves and immoveables, the property of the defendant and

PATTERSON  
ET AL.  
VS.  
M'GARRY.

East'n District  
July, 1820.

PATTERSON  
& AL.  
vs.  
M'GAHEY.

giving him one year's credit to pay the sum therein recognised to be due him. If it clearly appeared that the sum, for which the mortgage is given, includes the amount here claimed, it would be worth enquiring, if Fitz has, in reality, given up his lien on the cotton by taking the mortgage. But although it is admitted that at the date of the attachment there was no other debt due from M'Gahey to Fitz, than the account presented in this case may establish, there is no certainty that the mortgage includes it; because the attachment and the mortgage are both of the same day, and the debt mentioned in the mortgage may, for aught that appears, have been created after the attachment was laid.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

*Smith* for the plaintiffs, *Turner* for the defendant, *Morse* for the claimant.

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NAGEL vs. MIGNOT.

If a note, not payable to order, given in payment of goods be mislaid, and the de-

See the argument of counsel, in this case, 7 *Martin*, 657—707.

*DENBANT*, J. delivered the opinion of the

court. This is an action to recover the amount of a note of hand said to be lost. The plaintiff does not allege that this loss has been occasioned by a fortuitous event, unforeseen accident or overpowering force, the only cases, in which the law permits the introduction of verbal evidence to establish the former existence of a written title, and to prove its contents. But he says, that the provision of our code, which excludes oral evidence in other cases, is not applicable to commercial matters, of which kind he alleges this transaction to be. Supposing, however, such exemption to obtain in favor of commercial dealings, we do not see its applicability to the present case. Negotiable notes, payable to order or to bearer, are indeed considered as drawn in the course of trade, and are governed by the same rules as bills of exchange. But, what stamps upon them the character of a mercantile transaction, is their negotiability, or liability to be bartered away for the convenience of commerce. Take that feature from them, and they become simple obligations between man and man, which, so far from bearing any resemblance to commercial transactions, are entirely confined at home, and untransferable, except under conditions adverse to the nature of commercial dealings.

East'n District.  
July, 1820.

NADEL  
vs.  
MIGNOT.

Defendant does not plead payment, the court will be satisfied with slight evidence of its being mislaid.

East'n District.  
July, 1820.

NOTE  
vs.  
MIGNOT.

The note in this case, not being negotiable, we consider the article of our code, which is relied on by the defendant, as applicable to this claim, and we think that the plaintiff cannot recover the amount of the note, merely on making proof of its former existence, without showing that its loss happened through one of the causes expressed in the said article; unless he has, by some admission, relieved the plaintiff from the necessity of proving that fact.

We will proceed to examine first, whether the plaintiff has shewn sufficient cause to entitle him to establish his claim by oral evidence? The law requires proof of a fortuitous event, from which, as we conceive, the loss of the title may be fairly enforced: for, the case can hardly be supposed, where a witness could swear absolutely to the loss of the title, unless he had lost it himself. The French text speaks of the accident by which the party *may have lost* his title, *par lequel il auroit pu le perdre*. Somewhat differing from that from the English, which says: "the event by which he *has lost* it." "If in the fire and pillage of my house (says Pothier, in his treatise on obligations, no. 781) I have lost any papers, among which were notes from my debtor, to whom I had lent money, I ought to be admitted to prove, by witnesses, the sum which I lent &c.

In the above case, it is necessary that it should be admitted, or that I should prove, that my house was burnt or pillaged, before I can be permitted to introduce testimonial proof of the loss of money, of which I pretend to have lost the written evidence." It is enough then to prove a fortuitous event, by which it may be fairly presumed, that the loss complained of, was occasioned; for if nothing short of a deposition, that the title was seen by the witness, at the very moment of its destruction, was deemed sufficient, it would hardly ever happen that the loss of a title could be supplied by oral proof.

But this fortuitous event, by which the loss is presumed to have been caused, must be proved. Was any such thing done in this case? We are inclined to think that enough has been shown to open the door to testimonial proof. What amounts to a fortuitous event, in cases of this nature, must greatly depend on the kind of title which has been lost. A note of hand, sent out for collection, is exposed to more hazards than a sealed bond or a bill of sale in a desk. If when carried about, it should drop from the pocket of the carrier and disappear, would not this be a fortuitous event, with regard to the owner? It would seem just to consider it so. In the present case, a note, which had been so car-

East's District  
July, 1820.

Bank  
of  
Missouri.

East'n District.  
July, 1820.

NAOMI  
vs.  
MIDNOL.

ried about, is returned to the owner at a moment when his shop is full of people. May it not be reasonably inferred, that in the bustle it was mislaid and lost? And will not that be sufficient to give access to testimonial proof? We think it ought. In all suits of this kind, much is, of necessity, left to the discretion of courts of justice. The accidental occurrence must be weighed by them, and if deemed sufficient to create a strong presumption of the loss, ought to open the door to oral evidence; for after that proof is permitted to be introduced, they will, in all cases of this nature, hear it with great diffidence, and finally refuse it belief, if not altogether satisfactory.

But should this interpretation still leave some doubt in the mind, as to the sufficiency of the evidence produced, in this case, to create a presumption of the loss, there is one very forcible reason why the rigor of the law, relied on by the defendant, should bend on occasions like this. Whether nothing short of some very serious accident will suffice to authorise the introduction of oral testimony to prove the loss of a written act, or whether occurrences of less magnitude will be deemed sufficient, in case of the loss of one of those papers which are usually carried about, one thing is, at least, certain,

which is, that a law, intended to guard against the abuses of verbal evidence, can be invoked only by those who deny absolutely the execution of the written act, the existence of which is offered to be proved by parol: for if the party, against whom the loss of the written title is alleged, discloses, in any manner, that he is not ignorant of its former existence, and does not plead its extinction by payment or otherwise, there is not the same danger in admitting parol proof of its contents, and therefore no reason to apply with rigour to his case the law above mentioned.

Is there in this case an absolute denial that the note sued upon did ever exist? We think not. There are, to be sure, in the answer, expressions which would amount to that, if they stood alone. But the defendant pleads especially, in a manner which destroys their force. He first alleges that, at the time when the obligation is said to have been contracted, he was under age and unable to contract; and further, that the obligation, if ever contracted (which he denies) was without any legal consideration. Now, although, independently of the general issue, a defendant may set up other means of defence, to use them in case the general denial fails him, such special pleas must be consistent with the general one, not contradictory of it. In

East's District  
July, 1820.

N. WELLS  
vs.  
MIDWINTER.

East's District  
July, 1820.

NAOTE  
vs.  
MINOR.

this case, the defendant begins by saying that he did not execute the obligation ; but, by and by, he says that the obligation, if ever contracted, was without any legal consideration. How can he know whether it was or not, unless he knows first that the obligation did exist ? How can he plead want of legal consideration, without admitting the existence of the note ? But he first denied that the note ever existed. This mode of pleading double, on facts within the knowledge of the party, appears irregular and illegal, and is not in conformity with the positive provision of our statute, which requires the defendant to answer without evasion. He must either deny or admit *such facts*. He cannot say at once, that he did not, and that he did execute the act for which he is sued ; and when after having said that he did not, he discloses in other words that he did, his denial ought not to avail him.

We, therefore, think, that in a case like this, where there is an implicit admission of the existence of the written title, on the part of the person, who is said to have executed it, there is no occasion for those rigid rules, which require proof of the loss of it by a fortuitous event.

We make no mention of the bill of exceptions, taken by the defendant in the course of

the trial below, the point which is contested in *East'n District*  
it, having been yielded in the court by the plain- *July, 1820.*  
tiff.

We think upon the whole, that the judgment of the district court is correct; but the judge having omitted to provide for the security of the appellant, in case the note should again appear, we are obliged to reverse the judgment on that account.

It is, adjudged and decreed, that the judgment of the district court be reversed; and that judgment be entered for the appellee, for fourteen hundred and eighty nine dollars, he the appellee giving security to the appellant, in the like sum, that he shall return him his note of that amount, if he should again obtain possession of it, or indemnify him, if he should ever be sued upon that note; it is further ordered, that the appellee pay the costs of this appeal.

#### **SCHOLEFIELD & AL. v. BRADLEE.**

**APPEAL** from the court of the first district.

Several suits were brought by attachment against this defendant, his property was taken thereon, and judgments were rendered in the

It is sufficient to place the property attached in the custody of the law, that it be attached in the

East'n District  
July, 1820.

SCROLEFIELD  
ET AL.  
VS.  
BRADLEE.

garnishee's  
hands.

The debtor's  
property, be-  
comes the com-  
mon stock of  
his creditors, in  
case of insol-  
vency only.

respective suits for the plaintiffs. The plain-  
tiffs, in the present suit, obtained a rule against  
the plaintiffs in the other suits, to shew cause  
why the proceeds of the property attached,  
should not be applied to the discharge of their  
judgment. Thomas Holt & J. Goddard, two  
of them, shewed cause, and prevailed in the dis-  
trict court. The present plaintiffs appealed.

The counsel agreed that the record of the  
suits against Bradlee, should constitute the  
statement of facts.

With the record came a bill of exceptions  
taken by the counsel of the plaintiffs to the opi-  
nion of the district court, in rejecting parol evi-  
dence to shew that the goods attached had  
never been in the possession of Hyde, the gar-  
nishee. The district court being of opinion  
that evidence out of the record and the answer  
of the garnishee was inadmissible.

*Hoffman*, for the appellees. The present case  
comes before this court, in such a shape, as to  
make it difficult to come at the merits of it, with-  
out a recurrence to the records of the cases,  
lately decided in this court, between the attach-  
ing creditors S. S. Bradlee and Jos. P. Brad-  
lee, ante 21, and on that account, those cases

were made part of the statement of facts. The motion or rule for the distribution of the proceeds of the property, attached in the several attachment suits, against S. S. Bradlee, was entered at the instance of the counsel for Goddard, the first attaching creditor, and stands on the minutes of the court separately, in all the attachment cases, being six in number, to wit: *Holt vs. Bradlee*; *Goddard vs. same*; *Lee & Francis vs. same*; *Henshaw & Jarvis vs. same*; *J. Homdick vs. same* and *Scholesfield, Redburn & co. vs. same*. To the rule thus taken and entered, cause was shewn by the counsel for the appellants only, and the rule was made absolute. The judgment of the court below, does not order that the proceeds of the property attached at the suit of the appellants only, be distributed &c. but that the proceeds attached in all the attachment cases, against the defendant, be distributed according to the priority of their attachments. This judgment, therefore, must stand, unless the appellants can shew we did not attach the property in question. The transcript of the record sent to this court is imperfect, in as much as it does not give the rule as taken in all the cases; but should any difficulty grow out of this irregularity, it can prove injurious only to the appellants, who were bound

East'n District  
July, 1830.



SCOTT & SONS

& AL.

vs.

BRADLEE

East's District.  
July, 1820.

SCROFFIELD  
& AL.  
v.  
BRADLEE.

to bring the case properly before this court. They complain that the judgment of the court below is erroneous, and ask its reversal, and this they must make out. The presumption is, that the judgment is correct. A difficulty is now raised, which was not attempted in the court below. It is said that the property, attached by the appellants, cannot be shewn to be the same attached by Goddard and others, and claimed by Joseph P. Bradlee. This we contend, does fully appear from the record in the case; but if it be not the same, then the appellants have no claim to make against the judgment of the court. On the 23d of December, 1818, process of attachment was served upon J. W. Hyde, and the property of the defendant, S. S. Bradlee, attached. On the 7th of January following, the garnishee answers and sets forth the property in dispute, as the property of the defendant in his possession. Two days after, to wit: on the 9th of January, 1819, when the property of the defendant had thus been made known by the answer of the garnishee, the present appellants prevail on the sheriff to seize and take possession of it under their attachment, even after the garnishee had returned that same property in a court as attached, once already by the present appellants. A claim to the

property, thus attached, was filed by Joseph P. Bradlee, as well in the case of the present appellants as in those of the other attaching creditors. That claim was decided against the claimant in the court below, and on appeal the judgment was confirmed. Can the appellants now be listened to, in their attempt to show that the property now in dispute is not the same claimed by Joseph P. Bradlee? But the testimony, on file, in the case of Lee & Francis, which makes part of the record in this case, removes all doubt on the subject. The return of the sheriff, to the writ of attachment of the present appellants, describes the property attached in the same manner, as it is described in the testimony above referred to, and proves it to be the same.

Having removed the difficulty, which has originated in this court, we now proceed to examine the cause, shown in the court below, why the rule taken should not be made absolute.

1. That the property in dispute was not in the possession of the garnishee, at the time of the service of our attachment upon him. 2. That no sufficient levy of our attachment was made upon the property, inasmuch as there was no seizure or corporal possession taken by the sheriff. In support of the first point, parole evi-

South District.  
July, 1820.

RECORDED  
& INDEXED  
BY  
BRADLEE.

East'n District  
July, 1820.

SPENCER  
& AL.  
vs.  
BRADLEE.

dence was offered in the court below, but was deemed inadmissible, and a bill of exceptions was taken by the appellants. The return of the sheriff to the writ of attachment must be taken for true and parole evidence is inadmissible, to prove the contrary. We further contend that the fact attempted to be disproved was settled by a judgment, in one of the cases which now form part of the record in this case, and that the appellant was completely stopped thereby. That judgment cannot be said to be *res inter alios acta*, because it makes part of the record in this case. The appellants obtained a judgment, in this court, against Joseph P. Bradlee, upon the same testimony which now makes part of the record, filed in *Lee & Francis vs. S. S. Bradlee*, and now ask leave to prove the testimony not true and consequently the judgment erroneous. This we say the court below was correct in refusing.

3. We come now to examine whether there was a sufficient levy of our attachments, on the goods, the proceeds of which are now the object of controversy. Upon this point, we contend that the return of the sheriff is conclusive. He tells us that he did attach all the goods, &c. in the possession of the Messrs. Hydes, belonging to the defendant. Who can be heard to contra-

allot this return? But admit, for a moment, that our attachments were incomplete, until it appeared from the answer of the garnishee that he had property belonging to the defendant. Surely that cannot be pretended after answer made, and a statement of the property given into court. The property then, at least, may be said to be in the custody of the law. We place much reliance on the fact that the property attached by the appellants had been two days previously, described and returned into court as in the possession of the garnishee and that, not only in our attachments, but also in that of the appellants. Thus, it appears that the boasted diligence of our opponents consisted in wresting the key of the store, in which the goods were deposited, from the garnishees, to wit: Messrs. Hydes, and taking what they please to call corporal possession of them. Let it be remembered, that the store in which the goods were deposited was occupied by the Hydes; the rent of it was paid by them and that no other person had any other control over it. These facts are fully established by the testimony in the case of Lee & Francia, making part of the statement of facts. But all this enquiry, we contend, the appellants are stopped from making, by the decision of this court between the attaching credit,

East'n District.  
July, 1820.

*Scholarship*  
vs.  
BRADEN.

Eastern District

July, 1820.

SCROLEFIELD

&amp; CL

VS.

BRADLEE.

ors and the claimant. There is no weight in the objection that, with regard to the appellants, it is *res inter alios acta*, because it forms part of the record in the present case. The claimant there contended that Sweetzer, the agent of Joseph P. Bradlee, took possession of the property in question before the attachment in that particular case, was levied. But in answer to this, the court say, "The goods were then in the custody of the law." Now, it is clear that, if that be true with regard to the claimant, it must be so with regard to subsequent attachments. How came the property in the custody of the law? The answer must be, by force of the writ of attachment in the case of *Goddard vs. Bradlee*. Upon this principle have the appellants obtained a judgment against the claimant, and will the court now hear them to show its incorrectness?

Admitting, however, that we were reduced to the necessity of supporting our attachment by a recurrence to our statutes alone, the result must be the same. Under our attachment law of the 10th of April, 1805, some doubt might exist, as there is no provision respecting garnishees; but the law of the 20th of March, 1811, enlarges the remedy, facilitating a discovery of the property of an absent defendant. It is con-

ended that this latter law was intended for the discovery of the rights and credits only; the words of the act, however, do not authorize such a construction, for the garnishee is required to answer touching the *goods, chattels, moneys, &c.* of the defendant in his possession. This is an act to extend a remedy heretofore but imperfectly given, and should, therefore, be liberally construed. The great object in view, in creating garnishees, was to prevent the seizure of the property of third persons, and to prevent the litigation attendant on such errors. The court must be sensible of the fraudulent practices, a construction such as the appellants contend for must give rise to; for a garnishee, when summoned to answer, might have the property of the defendant so intermingled with his own as to prevent the sheriff touching it; but on the service of process, at the suit of one he might wish to befriend, he might point out the property to the sheriff and thus defeat the prior attachment. All such evils and inconveniencies are avoided by recognizing the principle that service upon the garnishee binds the property in his hands, and that is in conformity to the principle practised upon under the custom of London in cases of attachment, as also the attachment law of Pennsylvania. (See Sergeant

East'n District

July, 1820.

SCHOLFIELD

&amp; AL.

VS.

BRADLEY.

East'n District  
July, 1820.

SCHOOLFIELD  
ET AL.  
vs.  
BRADLEY.

on attachment, 12, 14, 15 and 20, and 1 *Midd.*  
*T. R.* 117. The fact that the property attached was sold by order of the court, upon application of the appellants, is much relied on, but can have no weight: for the order of the sale was made in such a manner as to preserve the rights of all others concerned. The property was perishable, which made it necessary that it should be sold, and it was deemed by the court unnecessary that it should be sold in the name of all the attaching creditors. The proceeds were ordered to be held subject to the further order of the court, with a view that previous liens might be first satisfied. Such is the usual mode in a court of admiralty, and is often practised in a court of common law.

*Grymes*, for the appellants. We contend that the judgment of the court below is erroneous, in ordering the proceeds of the property attached by us, to be paid over to other attaching creditors of the defendant, when it does not, nor can be made, appear that their attachments were ever levied, on the property the proceeds of which are now in question. The appellees, in support of that judgment, have attempted to shew that their attachments were the first levied upon this property; but neither the return of

the sheriff, nor the answer of the garnishee, shews it to be the same. The return of the sheriff in our case, is quite different from that made in those of the appellees, and we contend that the answer of the garnishee does not embrace it, because he never had it in his possession. The appellees caused their attachments to be served on Hyde, the garnishee, under an entire ignorance of the existence of the property we have attached, and to our exertions alone, are they indebted for the discovery. They are now striving to reap the fruits of our labor, and would fain imitate the lordly lion, by making jackals of us, to run down their prey. The proceeds in question are the same returned into the court by the sheriff, as the products of the sale of this property, made by order of court in our case only. In the order of sale, no mention is made of any other attachment. It was certainly incumbent on the appellees, to shew that they attached this same property; but the court below did not only dispense with that, but refused to hear our testimony to shew the contrary. To this opinion a bill of exceptions was taken by us, and should this court think we were bound to prove the negative, this case must be remanded to give us an opportunity of so doing. The court will ob-

East'n District.  
July, 1820.

SCHOLFIELD  
& AL.  
VS.  
BRADLEY.

East'n District  
July, 1820.

SCHOLEFIELD  
& AL.  
vs.  
BRADLEY.

serve that this is not the only property belonging to the defendant, and attached by his creditors. The Hydes had a large amount in their possession, to which we never laid any claim, and which has been sold by order of court, on application of the appellees. It is alleged that the sheriff received the key of the store, containing the goods on which our attachment was levied, from the Hydes: but, can any person for a moment, believe that these gentlemen would have delivered to the sheriff the key of a store, in which there was a large amount of property, without an order of court, and at his mere request.

Admitting, however, that the property in question was in the possession of the Hydes, there never was any other levy of the attachment of the appellees, than by citing the Hydes as garnishees. This, we contend, was not a sufficient service of the writ. It may bind the rights and credits of the defendant, in the hands of the garnishees, but nothing more. The act of the legislature of 1805 gives the remedy by attachment and by the words of the writ therein given, the sheriff is commanded to seize and take into his possession, the goods and chattels &c. of the defendant. The sheriff is likewise required to execute the said writ in the manner

therein directed, and to make a particular return of all goods, &c. which he shall have attached, or seized by virtue thereof. The return of the sheriff, to the writ of attachment issued out by the appellees, shews that nothing of the kind has been done by him.

East'n District  
July, 1820.

SCHOLFIELD  
& A.  
Att.  
BROOKS

The law has been complied with in the service of our attachment only, and it is, therefore, the only one which can bind the property. But it is contended by the appellees, that the act of 1811 has altered the former law, so far as to make it no longer necessary that actual possession should be taken, where property is attached. There is nothing in that law from which such an inference can be made. The object of that law was to enable the creditor to attach the rights and credits of his debtor, in the hands of a third person, and in that case only, leaves the amount to be developed by the answer of the garnishee. An actual seizure is not dispensed with, in all cases where it can be made; and it is, with reference to rights and credits only, that the authorities cited from *Sergeant on attachments* must be understood.

DERRICK, J. delivered the opinion of the court. The plaintiffs having attached the property of the defendant, and obtained judgment

East'n District.  
July, 1820.

  
SCHOLEFIELD  
& AL.  
VS.  
BRADLEY

against him, were proceeding to have it levied on the proceeds of the goods attached, when Thomas Holt interfered and pretended to be paid in preference to them; being an attaching creditor of the defendant's property of an anterior date. Three questions arise on this contest: 1. Is the property attached the same? 2. Are both attachments equally regular and complete? 3. Has the first attaching creditor a right to be paid first?

**L.** The property in dispute consists in goods of the defendant, which had been in the possession of Charles B. Sweetzer, an agent of his and which Sweetzer, on leaving this country, had placed under the care of Wm. and Joseph Hyde, of this place, according to instructions from his employer. The goods were not removed from the store in which they were deposited, but the key of the store and the invoices of the goods were delivered to the Hydes. Things were in that situation, when Thomas Holt laid the first attachment on the property of the defendant in their hands. The answer and deposition of J. W. Hyde, as garnishee, establish the facts, as above stated. The plaintiffs in this case and several other creditors afterwards laid attachments also on the goods of the defen-

quant in the hands of J. W. Hyde. His answers are the same in all cases.

But, the plaintiffs, some days after having attached the property, in the same hands and in the same manner, as the other creditors, caused the sheriff to attach, particularly, a certain quantity of goods in a store no. 4 Blenville street. Are these goods distinct from those which had been already attached in the hands of J. W. Hyde? An attempt has been made to shew that they are; and, by the manner in which this second attachment is described, some doubt has been created respecting their identity; but, from an examination of the records of the several suits brought against Samuel S. Bradlee's property and the whole course of those proceedings, it evidently results that the goods here in dispute are the identical goods which were placed under the care of the Hydes, by Sweetzer, and which, having been attached in the hands of J. W. Hyde in this suit and several others, were claimed by Joseph P. Bradlee, and finally released from that claim by the judgment of this court. Should it, however, be deemed satisfactory that direct proof should be quoted in support of that belief, it may be found in the sheriff's account of the sale of the goods, where, among the items, deducted out of the gross

Eastern District,  
July, 1820.

SWEETZER  
ET AL.  
VS.  
BRADLEE.

East'n District  
July, 1820.

SCHOLFIELD

ET AL.

VS.

BRADLEE.

amount, he mentions the store rent and other charges which he paid to the Hydes, and the costs of court in all the attachment suits carried on against those very goods; and it may be further proved in the testimony of J. W. Hyde, who swears that the store in which those goods were placed, and of which the Hydes paid the rent, is the same store in which the same goods were afterwards sold by the sheriff.

The bill of exceptions, by which the plaintiffs complain that they were not permitted to show by oral testimony, that Hyde, the garnishee, never was in possession of the goods attached in this case, we think, cannot avail them. They themselves attached in his hands these identical goods, before they pretended to attach them again in another form. There is abundant proof on record that Hyde had them in his possession, and among others the sheriff's account and return, against which we think that oral evidence could not be received.

II. The second ground, insisted on by these plaintiffs, is that their attachment is regular and right, while the others are insufficient. The fact on which they rely, in support of that assertion is, that not content with attaching in the hands of the garnishee the property of the de-

fendant, as did the other creditors, they afterwards caused the sheriff to take it into his particular custody. We think, however, not only that an attachment in the hands of a garnishee is sufficient to place the property in the custody of the law ; but that, after the service of such an attachment, the sheriff had no right to go and take the property from the garnishee, without a further order of the court ; and that, by taking it, he has neither bettered the situation of these plaintiffs, nor made the condition of the others worse.

III. These plaintiffs contend that the first attaching creditor has no right to be paid in preference to them, in other words, that the property attached ought to be distributed among the attaching creditors. We know of no circumstance where the property of a debtor becomes the common stock of his creditors, except that of insolvency. The debtor in this case is a foreigner, and resides abroad. He cannot claim the benefit of our insolvent laws, nor can his creditors invoke those laws in their behalf.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

East'n District  
July, 1830.

SCHOLEFIELD  
& AL.  
vs  
BRADLEE.

East'n District.  
July, 1820.

MARIE vs. AVART'S HEIRS.

MARIE  
vs.  
AVART'S HEIRS.

APPEAL from the court of the parish and city  
of New-Orleans.

This case, which was originally instituted against the deceased's executor alone, was before this court, in June term, 1819, and remanded. On its return to the parish court, the heirs were made parties. 6 *Martin*, 731.

They pleaded the insanity of the testator, and consequent nullity of the will; that neither the plaintiff, nor her child, could receive any thing under a will; nor could she, being a slave, maintain any action, except against such persons as unlawfully detained, and deprived her of her liberty; that the clauses of the said will invoked by the plaintiff, are contrary to law and void. They prayed that the cause might be tried by a jury.

The following issue was submitted to the jury, by the defendant: E. R. Avart, was not of sound mind, at the time of making and signing the last will and testament, upon which this action is brought.

The plaintiff's counsel objected thereto, urging that under the *Civil Code* 80, art. 17, such proof is inadmissible. The parish court

overruled the objection and he took a bill of exceptions.

Eastern District  
July, 1830.

The jury found the issue for the defendants.

MAKIN

A new trial was moved for on the affidavit of the plaintiff's counsel, stating the discovery of new and material evidence, not in his knowledge before, viz : that Cherbonnier went to see the testator about the time, and after he made his will, remained with him a considerable time, and he believes he was during the whole time of perfect, sound mind. Risteau was present, when A. Choppin, one of the heirs, came to the testator's house (after he had given himself the stroke with a sword, which occasioned his death, and before he made his will) and took out from a desk a check which he, Choppin, had given to Avant the day before, to purchase and emancipate the plaintiff.

The new trial was refused, and the plaintiff appealed.

*De Armas*, for the plaintiff. The will is an authentic one and has the following clause: *Erasmus R. Avant, residing in this city, in Conti-street, has been found, by the said notary and witnesses, lying on his bed, sick of body, but of sound mind, memory and understanding, as it appeared to the said notary and witnes-*

East 11 District 208.  
July, 1820.

MARIN  
VS.  
AVART'S HEIRS.

Among other dispositions, the testator acknowledged for his natural child, Gaston, the son of the plaintiff, a mulatto woman, belonging to Nicholas Lauve, bequeathes freedom to her and the usufruct during her life of two houses and the lot of ground on which they stand, with a sum of money ; and to the said Gaston, at the death of his mother, the property of the said houses and lot, burdened with the usufruct. He made several other legacies and concluded by instituting for his heirs, by equal shares, his brothers and sisters, and appointing his brother Robert Avart, his executor. The will terminates by the following clause : *it is thus, that this last will has been dictated by the testator to the notary, who has written the same as it has been dictated ; and the said notary, having read this said will to the testator, he has declared to understand and comprehend well the same, and to persevere therein ; the whole in the presence of the said witnesses.*

There were two exceptions to the admission of the testimony, introduced in this case.

1. The first is grounded on the statute providing that, after the death of a person, the validity of acts done by him or her, cannot be contested for cause of insanity, unless the interdiction was pronounced or petitioned for, previous to the

death of such person. *Civil Code*, 80, art. 16. East'n. District.  
July, 1820.

It was necessary before the defendants should have been permitted to contest the will, for cause of insanity, that they should have shown that an interdiction had been pronounced or petitioned for, previous to the testator's death.

This article of the code cited is a legislative innovation. No doubt that, according to the Spanish law, before the promulgation of our code, a will could be contested for cause of insanity, though there was no interdiction pronounced or petitioned for, against the testator; but this article changes the legislation, and forbids, in the most express, clear and energetic terms, that after the death of a person, the acts done by him be contested, for cause of insanity, unless an interdiction has been pronounced or petitioned for, previous to his death.

But, perhaps, it will be said that it relates only to the ordinary acts of life, and cannot be applied to donations and testaments; but, it is indefinite, and embraces all kinds of acts, without any distinction, and where the law makes no distinction, the court cannot make any; and our law has provided that, when a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit. *Civil Code*, 5, art. 13.

East's District  
July, 1820.

MAIRIE  
DE  
AVANT'S BRUN

That, in France some courts of justice have decided that this disposition does not apply to donations and testaments, and others quite the reverse; cannot be denied; but in that country, a greater latitude is allowed to the judges than in ours, where we are the slaves of the laws, in order that we may be free.

Besides, *non exemplis sed legibus est judicandum. C. de sent. 1, 13. Etiam non tam spectandum quid Romæ factum est, quam quid fieri debuit. ff. de offic. præst. l. 13.*

Our code speaks of all acts without exception. The only question which remains for us to examine is, whether the framers of it, our legislators, to whom we had delegated the power of prescribing the rules of our civil conduct, with the solemn obligation on our part, to submit to such rules, have considered testaments and donations, as *acts*. This examination, they have taken the trouble to facilitate to us, by declaring that a donation *inter vivos* is an *act* by which, &c. *Id.* 208, art. 2. A donation *mortis causa* is an *act* by which, &c. *id.* art. 3. A testament is the *act*, &c. *id.* 226, art. 83.

After this, can any doubt remain? Will our supreme court permit themselves to be guided by the interpretation, or the application that some of the French jurists and tribunaux have

adopted, as to the corresponding article in the *Code Napoleon*? No, they will say as heretofore; "with whatever deference and respect, we may view the opinions of the authors cited (French judges and jurists) we are not certainly bound to adopt them. As the article of our code is indefinite, and does not distinguish and limit the species intended to be embraced by it, courts of justice cannot make any distinction." *Turpin vs. his creditors. 7 Martin, 53.*

East'n District.  
July, 1820.

Martin  
vs.  
Avant's heirs.

The only answer they will make to the defendants is, *sero accusatis mores quos probavistis.*

2. The second exception, not less founded in law, is that the evidence is inadmissible, independently of the article of the code cited.

According to the Spanish law, not repealed in this particular, an insane person may make a will, during a lucid interval.

An insane person cannot make a will, whilst he is so. *Part. 8, 1, 13.*

It is forbidden to make a will to a person who is out of his memory, *desmemoriado*, by which name the law of the Partidas, means a mad person or *non compos mentis.* *Sala, ilustracion del derecho real de Espana, lib. 2, tit. 4 de los testamentos, v. 9.*

An insane person, and a person out of his me-

East'n District.

July, 1820

MARIE

vs.

AVANT'S HEIRS

mory, as long as they continue so, cannot make a will: but the will which they make before the madness or insanity is valid, as also the will which a madman makes during his lucid interval, if he concludes it within the lucid interval; for if before the will is terminated, the fit of madness returns, the will will not be valid. *Febrero, contratos* 1, 1, § 6, n. 20.

In this respect, the Spanish law agrees with the Roman law. The princes who have preceded us, and we have been pleased to decide that a madman may make a last will, during his lucid intervals, though the ancients entertained some doubts about it. Now it is a question to be decided, what would be the consequence, in case, after having begun his last will, the testator should become mad again, a point about which the ancients had also doubts. We therefore, enact, that the testament of a man who, in the very act of making his testament, may labor under the disease, be null and void. But if he should wish, during a lucid interval, to make his testament or his last will, and should begin it, being of sound mind, and should finish it before such disease should return, we order that the testament or last will, whatever it be, be valid; provided, all the other formalities, which are required by law for such acts, be complied with. *C. 6, 22, 9.*

But in this respect, the Spanish law differs from the French, which I beg the court to attend to : as this difference serves to account for the inapplicability of many French doctrines and rules of proceedings, to the present case.

East'n District.  
July, 1830.

MARIN  
VS.  
AYART'S HEIRS.

In France, from the very instant madness has made its appearance in an individual, he is to be considered always as mad : *Semel furiosus, semper furiosus presumitur*, and he is thereby rendered absolutely incapable of making a will, at any time afterwards, though he should have the most evident and longest lucid intervals.

Besides, says Merlin, it is very difficult, in France, to admit the circumstance of lucid intervals. They have felt there the inconveniences of the Roman law, or rather of the interpretation that has been attempted to be given to it. All would be doubtful and arbitrary ; the condition of men must be more certain. It is true, that old practitioners, who thought they had done much, when they had translated a Roman law into French, have said that the Roman law contained an exception, in favour of those intervals. But Mornac has judged of that law more correctly than them, when he said : " we hold, from the decisions of the courts, that the testament made by a testator who has lucid in-

East'n District.  
July, 1820.

MARIE  
VS.  
AVART'S HEIRS.

tervals is null." And in fact, no judgment of a court can be cited which has admitted and authorised the distinction of intervals, in order to support a testament, made since the commencement of the insanity. *Repert. de jurispr. vo. Testament.*

According to the Spanish, which is our law in this case, Erasmus R. Avart, could then make his will, during a lucid interval, and though he may have been mad before and after the making of the will, if it has been made during a lucid interval, it must be maintained.

If the notary, who has received the will of Avart, knew his professional duties and has complied with them, which must be taken for granted, till the contrary is proved, nobody else but the notary, the three witnesses to the will and the testator were in the room at the time of making and signing it.

Febrero, speaking of the manner in which the notary is to receive a last will, says: "nobody must know what it (the testament) contains, if it is an open one, till the moment of its being read to and approved of by the testator, at which time none else must be present, but the witnesses. 1 *Contratos*, 1, 1, § 20, n. 275.

In the same number, he gives the reasons why nobody else, but the witnesses, should be pre-

sent : in order to avoid, by this means, all kind of suggestion, particularly if he (the testator) is sick, and that he may be at liberty to explain what his wishes are and to discharge his conscience; because experience has taught that, when that is not complied with, testators make dispositions forced, repugnant and hurtful, which serve only to create discord and law suits.

In the second volume of a work entitled, *Cartilla real teorica práctica, segun las leyes reales, de Castilla, para escrivanos, notarios y procuradores*, and which contains all the duties that the laws and usages of Spain have imposed on notaries, together with the forms of the acts to be passed before them, (p. 1.) it is said the notary, before all, should never lose sight of the following warning: when he is going to receive a will, he should not consent that there be present any other person than he, the witnesses and the testator. The presence of other persons serves only to embarrass, and it has happened often that sinistrous wills have been executed, because the notary permitted persons to remain, who ought not to have been present. It is important that this warning be attended to, because the will of the testator (as it will be said afterwards) in what he is permitted to do, and his wishes must be free and spontaneous, and no

East'n District  
July, 1820.

MARIE  
VS.  
AVANT'S HEIR.

East'n District.  
July, 1820.

  
MARIN  
VS.  
AVART'S HEIRS

person should remain there who, by force, caresses or prayers, may induce him to dispose of his property, in a manner contrary to his intention and conscience. The person, who should remain there and the notary, who might permit it would be bound to indemnify the person to whom the testator was prevented from bequeathing what he intended to bequeath; and the notary, besides, if that be proven, ought to be punished.

Now, by whom is it intended to prove that Erasmus R. Avart was not in a lucid interval (supposing that he has ever been insane) when he made his will? It must be either by persons who were not present, at the making of the will, or by the notary and the three witnesses who were present.

I say that this proof cannot be made by the former, not only because not being present they cannot say that it was not in a lucid interval that the will was received; but, because, in the will, there is the attestation of the notary and the three subscribing witnesses (who were, by the by, the only competent judges of the mind of the testator, at the time he made his will) that he appeared, at that time, of sound mind, memory and understanding, and as the attestation was signed after the will was dictated by the testator, written and read to him, by the notary.

ry, it follows that he appeared so to the witnesses, from the beginning to the end ; which is evidence of a lucid interval. We have then in the testament a written proof of the sanity of the testator at the time, against which no oral testimony can be admitted. *Contra scriptum testimonium non scriptum testimonium non fertur*, is a maxim of the civil law which receives exception but in few cases, of which the present is not one. But, supposing that the law should not prohibit oral testimony to be received in a case like this, of what weight can be the deposition of witnesses, on the lucid interval during which Erasmus R. Avart is said to have made his will, when they were not present ? Let one hundred witnesses declare that the testator was as insane as a man could be, before and after he made his will, does it necessarily follow that the will was not made during a lucid interval ? The notary and witnesses affirm that it was ; the other witnesses can only deny it : and, in this case, it is a principle of law that more credit is to be given to two witnesses who assert an affirmative, than even to ten who deny it.

Castillo, in his work entitled, *Quotidianarum controversiarum juris opus*, gives a full treatise *de conjecturis et interpretatione ultimarum voluntatum* (chapter 28) and observes " that the

East'n District.  
July, 1820.

MADE

BY

AVART'S HEIRS.

East'n District.  
July, 1820.

MARIA  
vs.  
AVANT'S HEIRS.

proof by two witnesses, that a person was of sound mind, at the time of making an act, has the preference over the proof by many that he was insane before. More credit is given to witnesses who depose that a person is of sound mind, than to those who depose the contrary, and it is alike as to sanity and madness; because witnesses, who depose in favor of sanity, depose of a quality which naturally exists in every body; therefore, they are preferred to the others who depose of the insanity. Two witnesses who depose that a man was of sound mind, deserve more to be believed than ONE THOUSAND, who should attest that he was mad or insane.

Therefore, according to law, to reason and to the very nature of things, the court below ought not to have admitted witnesses, who were not present at the making of the will, in order to prove that it was not made during a lucid interval.

Let us examine now whether the notary and the witnesses, who have received the will, are competent witnesses in the present case.

Febrero observes, "that in order to have the testament of a mad person, who has lucid intervals declared null, it is necessary to prove in a clear and convincing manner (this is the translation

of the word *concluyentemente*, given by New-  
 man, in his much esteemed dictionary of the  
 Spanish and English languages, London, 1817)  
 by the notary and subscribing witnesses that,  
 at the time of making his will, the testator was  
 mad and had no such lucid interval. 1 *Con-*  
*tratos*, 1, 1, § 1, n. 10.

East's District  
 July, 1820.

MARTIN  
 vs.  
 AVART'S ELL

The wisdom of this doctrine, founded on the  
 nature of things, which considers the notary  
 and the subscribing witnesses as the only per-  
 sons fit to depose upon a transaction, at which  
 they alone were present, is of the highest evi-  
 dence. But is it general, that is to say, are the  
 notary and subscribing witnesses to be heard, in  
 every case? Is it not modified and restrained  
 by any other disposition of the law?

There is a maxim, in regard to the interpre-  
 tation, which judges and jurists ought never lose  
 sight of, and that is, that laws are to be taken  
 together, and interpreted the one by the other :  
*In civile est, nisi tota lege perspecta, una ali-*  
*quâ particula ejus proposita, judicare, vel res-*  
*pondere. L. 21. ff. de leg.*

When a witness contradicts himself, in what  
 he says, his testimony shall not be valid. *Part.*  
 3, 16, 41.

When a person, without being put under his  
 oath, relates a fact extrajudicially, and after-

1st District  
July, 1820.

MARIN  
vs.  
VART & HEINS.

wards, being interrogated judicially, contradicts himself, it is in the discretion of the judge to believe, or not, his judicial deposition. 3 Covarrubias, 302.

Let it be permitted to me, to make here, by the bye, an observation which I consider as being important. In Spain, the judges are in general obliged to decide conformably to the testimony submitted to them; they may be sued, when they do not decide according to the testimony; but here, in every case, a certain latitude is left to our courts of justice, to appreciate the credit which is due to the witness.

Let us return to Covarrubias. He continues: If a witness extrajudicially affirm something under oath, and afterwards depose the contrary in court, neither of his testimonies ought to have any force.

The person who has given testimony in a suit which has been declared irregular and null, and afterwards says the contrary, before the legitimate judge, deserves no credit.

So it is, when a person has previously said some thing, though not under oath, but under his signature or seal: because then credit ought rather to be given to his first declaration (that under his signature or seal) than to the second given in court. *Id. loco citato.*

This doctrine rests upon considerations of East'n District  
morality and justice, the wisdom of which July, 1820.  
cannot certainly be disputed. Truth is one; it  
is the same at all times, and in all places. If, **MARIE**  
in order to administer justice, it be necessary to **VS.**  
know the truth, can one flatter himself to know **AVANT'S SENT.**  
it, when, like aameleon, it will, according to  
time and place, put on different colours and pre-  
sent itself under different forms.

True it is, that in countries, where the com-  
mon law prevails, it is held that, except in re-  
gard to a negociable paper, a witness can be  
heard to contradict what he has said or written  
before. But, sound morality reproves such a  
doctrine and happily for us we live under a sys-  
tem of law, which rejects entirely such a mon-  
strous doctrine.

In those countries, we have seen great men,  
of superior genius, oppose this doctrine with  
energy; but the current of authorities and the  
strength of habit got the better of them. Let  
us listen to lord Mansfield, one of the most ce-  
lebrated jurists of England, who had made  
a particular study of the civil law, of which he  
was an admirer and zealous partisan. In the  
opinion he gave in *Walton vs. Shelley*, 3,  
*Durnford & East*, he observed "the old ca-  
ses, upon the competency of witnesses, have

East'n District:  
July, 1820.

MARIN  
vs.  
VART'S HEIR

gone upon very subtle grounds; but, of late years, the courts have endeavored, as far as possible, consistent with those authorities, to let the objection go to the credit, rather than to the competency, of a witness. What strikes me is the rule of law founded on public policy, which I take to be this: that no party who has signed a paper or deed shall ever be permitted to give testimony to invalidate that instrument which he has so signed. And there is sound reason for it; because every man, who is a party to an instrument, gives a credit to it. It is of consequence to mankind that no person should hang out false colours to deceive others; by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it. The civil law says, *nemo allegans suam turpitudinem est audiendus.*"

Judge Lyons, of the supreme court of appeals of Virginia, in *Baring vs. Reeder*, speaking of the dangerous consequences which result from permitting a man to depose against his acts, says: "for my part, I conceive that the case of *Walton vs. Shelley* was the best law, and ought to prevail against the latter opinion, which opens a door to fraud and perjury. 4 Hen. & Mumf. 174.

If this doctrine be sound, as to all acts in ge-

neral, how much the more is it when applied to wills? May the fate of so solemn an act depend on the perjury of witnesses, so indelicate as to come and give the lie before a court of justice to the truth, which their signature attests in an authentic act? A witness, after he has voluntarily put his signature to an act, in which he declares that the testator appeared to him of sound mind, is not to be believed afterwards, when he comes to declare the contrary. Why? because his signature gives a perpetual lie to his declaration, and because it is necessary that those, who affirm a fact before a court of justice, should not have previously attested the contrary. When in an act, the notary and witnesses have attested a fact, they may not be called on to disprove it, because once more their deposition would be in contradiction with what they have stated under their signatures; their prevarication must always be proved by other witnesses. If we could deviate in any particular circumstance, from principles so evidently founded on reason, certainly it could never be in the case of a will. When, in such an act, witnesses have attested that the testator appeared of sound mind, they cannot come and say, without belying themselves, that the testator was not so found.

East'n District:  
July, 1830.



MARIA  
VS.

AVARY'S HEIRS.

East'n District.  
July, 1820

MARIE  
VS  
AVANT'S HEIR.

If the morality of a witness is to influence the credit due his deposition, pray what idea presents of himself the subscribing witness, who comes forward, in order to contradict what is contained in an act, which he has subscribed? When he was signing the will, the law, which consecrated his functions, presumed him to be honest and worthy of confidence. The testator, who sent for him, confirmed by his confidence this presumption. But the moment he opens his mouth to contradict what he has attested, he places himself in the most unfavorable point of view. The court, filled with indignation, evidently sees that the man who addresses it is an impostor; what confidence can it give, therefore, to the testimony of a man who, by his own act, shows himself unworthy of credit?

The public good demands that the fate of acts should not depend on the seduction and corruption of those who, after giving them authenticity, attempt to annihilate them.

A notary is an officer, in whom the public have placed their confidence. He is commonly one, whose probity and talents have been acknowledged. He is commissioned by the executive with the consent and advice of the highest branch of our legislature. Every thing

makes it his duty to preserve the good opinion that he must necessarily have given of himself in order to deserve that such important and honorable functions should be trusted to him. His rank in society is so high, that he must be either very blind or very corrupt to expose himself to lose, or even bring his character in question.

East'n District  
July 1820.

MARRAS  
DE.  
AVANT'S HEIRS.

The persons who are commonly called to witness the execution of wills are offered by chance on the spur of the occasion, and their morality is often at least equivocal.

Let us suppose, and that is often the case, that a notary be sent for to a remote part of the city, and at a late hour, to receive the will of a wealthy man, having collateral heirs, whose conduct towards him has stifled all sentiments of benevolence, whilst more remote relations, or even strangers, have acquired sacred titles to his beneficence. The notary causes the three witnesses to be called, who are the most easily to be found. He is convinced that the mental situation of the sick man permits him to make his will. He receives his last dispositions; and in order to have a written proof that he has complied with the disposition of the code, which forbids to receive the testament of any person insane, because he knows that a notary, like Cesar's wife, not only must be pure, but must

East'n District.  
July, 1820.

MAKIN  
vs.  
AVANT'S HEIRS.

also be unsuspected, he takes the wise precaution to state in the act the sanity of the testator by a clause, to which the witnesses agree, inasmuch as they sign it, without any kind of constraint or opposition. If afterwards these witnesses can be heard to contradict the attestation, will not the heirs use every effort to seduce the witnesses and bring them forward in order to invalidate the will, and if it be a truth, which nobody can deny that interest is the principal cause of all crimes, will not witnesses in many cases be tempted to accept a bribe?

If such witnesses could be heard, who is the man, who has collateral heirs having a legal right to his succession, *ab intestato*, who could dispose in favor of friends or even remote relations conformably to law, with the assurance that after he descends into the grave his greedy legal heir will not attempt to question his capacity and sully his memory by indiscreet inquiries. There is a doctrine more humane, more moral, in a word more conformable to the rules of justice, contained in our statute book, which provides, that, as soon as death has seized upon an individual, he ceases to belong to human justice, except in a specified case; that the living shall not be permitted to take him out of his grave and drag him before a court, where it is no

longer in his power to defend himself, and there  
 attack his capacity and his memory, with the  
 view of seizing upon the estate he left. *Civil*  
*Code, 80, art. 16.*

East'n District.  
 July, 1820.

MAIRIE  
 vs.  
 AVERY'S HEIRS.

Let us conclude, therefore, that we cannot absolutely receive either the declaration or deposition of a witness to a will, in which the mental capacity of the testator has been certified; his deposition cannot be of any weight before a court of justice; it is declared null by the law, without it being necessary to examine whether it be contrary or conformable to his written testimony. It adds no credit to it, if it contains the same facts; it does not shake it, if it contains contrary ones.

If in France, wills containing the attestation of the notary and witnesses, that the testator was of sound mind, have been attacked on an allegation of the insanity of the testator, and witnesses heard to prove it: it is because, there, as we have already observed, from the very moment that an individual committed an act of insanity he was, by law, rendered absolutely incapable of making a will, and though he should have made one in a lucid interval, however wisely and legally he might have disposed of his estate, his will was null and void. The attestation of the notary and witnesses that the testator was

East'n District.  
July, 1820.

MAIRIE

vs.

AVARY'S HEIRS.

of sound mind shewed that the will had been made in a lucid interval ; but, as that was not sufficient for its validity, the heirs were permitted to prove the insanity of the testator before the will. But, I defy any one to cite a single case in France, where the subscribing witnesses to a will containing a declaration that the testator, at the time of making his will, appeared to them of sound mind, have been admitted to prove the contrary.

By a judgment of the 16th of June, 1753, reported by de Gras senior, it was decided in the grand chamber (of the Parliament) that on a will contested on the ground of the insanity of the testator, at the time, before or after, the subscribing witnesses could not be heard, and their depositions were rejected by the tribunal when it pronounced on the objections against them, though they had been already heard in the request made by the party who maintained the validity of the will. This decision was grounded on a consideration of the consequences prejudicial to the repose of families, if witnesses, after having signed a will, in which it was said that the testator was of sound mind, could be heard again. Their depositions, in favor of the will, would be useless, inasmuch as the testator having the presumption in his favor, strengthen-

ed by the attestation of the notary and witnesses, those persons cannot give to it an additional force by their depositions in an inquest, and it would be attended with the most dangerous consequences allow them to depose against the will and disavow or contradict what they had attested and to permit the most solemn acts to be thus destroyed.

East'n District.  
July, 1830.

MAKES  
BY  
AVANT'S PRINTING

Will it be said, after such a decision, and without legal authority, that the declaration or attestation, which the notary and witnesses give in the will, that the testator is of sound mind is a matter of form, is a clause of style to which no importance is attached? Let a court of justice, before they sanction such a legal heresy, reflect maturely, and consider the dreadful consequences to which it would lead. If any part of so solemn an act as a testament is to day declared a matter of form, there will be no bounds to the doctrine. To-morrow a like decision will take place concerning another part of it; the ordinary contracts will soon have the same fate, and the broadest of all doors will be opened to suits, disorder, confusion and ruin. There will be few testaments, in which the testator shall have disposed so as to deprive his legal heirs of a portion of his succession which, if the will is annulled, will go entire to them, that shall not be successfully attacked.

East'n District.  
July, 1820.

MAKES

DE.

ADVANT'S HEIR.

In Spain notaries generally receive wills according to the form prescribed in *Part. 3, 403*, and that given by Febrero.

That given by the Partida is as follows: "Know all men who shall see this instrument that I, Estevan Fernandez, being sick of body but of sound mind, make this my testament, &c."

After prescribing how the testator is to dictate his will, in which it makes him speak always in the first person, it concludes: "and on his part the notary is to state the place where the will was made, and before what witnesses, and the day, month and year."

The form given by Febrero is as follows: "In the name of God Almighty, amen. I, *a one*, &c, being through the divine mercy well and sound and in my entire understanding, &c."

Here follow the dispositions of the testator, who speaks always in the first person, and the only words spoken by the notary, at the end of the will, are these: "Thus dictated and signed before the present notary, at such a place, on such a day of such a month and year, A. B. C. and D. residing in the same place, being witnesses."

It is clearly to be seen by what is stated, that in Spain the notary and witnesses are silent on the sanity of the testator, and it is in such cases

(and not in a case where the notary and witnesses have declared in the will that the testator appeared to them of sound mind) that they can be heard upon his sanity, according to what Febrero says : and even in that case, unless it be proved by the notary and subscribing witnesses in a clear and convincing manner, that the madman, at the time of making his will, was not in a lucid interval, the will is to stand.

East'n District  
July, 1830.


MADE  
BY  
AVART'S WIFE.

Another reason which opposed the admission of the parole evidence of the insanity of the testator, at the time of making his will, is that which results from the wisdom with which he has disposed of his property. In it we see, it is true, that Erasmus R. Avart disposes of a portion of his property in favor of two natural children ; but, in these dispositions, who is the man, callous enough to all natural sentiments, who instead of seeing feelings natural not only to men, but to animals, will discover an act of insanity ? Certainly Avart, in becoming father of such children is not exempt from reproach in the eyes of morality ; but he did not infringe the laws of his country, since the framers of our code (more humane than certain stoics who have no indulgence for the frailties of others, because they were lucky enough to be born virtuous, or perhaps because circumstances have

East'n District.  
July, 1820.

MAINE  
VS.  
AVANT'S HEIRS.

favoured them) have impliedly permitted donations *causa mortis* and *inter vivos*, to be made to concubines, *Civ. Code*, 214, article 10, and, in several places, not only have permitted dispositions in favor of natural children, but have given them certain rights on the successions of their fathers and mothers. Our legislators knew that they were framing law for men like themselves. At the time, that they wished to favor marriages, on which the prosperity and good order of society chiefly depend, they knew, also, that *jura sanguinis nulli jure civili dirimi possunt. C. 8. de reg. jur.* It is evident, therefore, that Erasmus H. Avant, not only obeyed the dictates of nature, but, also, acted under the authority of the law. He could, according to it, institute as his heirs other persons than his brothers and sisters. He could, as it is often practised in this country, after disposing in favor of his concubine and natural children of all the law permitted him to bequeath to them, institute for his heir some friend, who would have taken the obligation to dispose of his succession, according to his directions. But that he did not do; he again obeyed the dictates of nature, and instituted as his heirs those very brothers and sisters, who come now to contest his mental capacity.

Let any person read the will with attention ; East'n District  
 let him examine every one of its clauses ; let July, 1820.  
 him reflect that it is the testator himself who has  MADE  
 dictated it, as appears not only from the instru- TO  
 ment itself, but from the declaration contained AVANT'S BEING.  
 in the opinion given by the judge *a quo*, in re-  
 fusing the new trial, in which, he says: "*it is*  
*fully admitted that the last will was dictated to*  
*the notary in the presence of the witnesses, as*  
*the copy thereof has exhibited it,"* and let him  
 pronounce, if he dares, that it is not the work of  
 a man who, at that time, did enjoy the ple-  
 nitude of his mental faculties.

There is not an impartial man, but, who after  
 reading the will carefully, will declare that if  
 the testator had ever been mad, he was, beyond  
 any doubt, in a lucid interval, when he dictat-  
 ed it.

Castillo says, the common opinion of doctors  
 is that a contract, or testament, properly made  
 by an insane or mad person, who had lucid in-  
 tervals, is good and valid in the same manner  
 as if it had been made by another, though there  
 would be no proof, that at the time of making  
 the act, he had lucid intervals : because, the  
 presumption of madness is destroyed by the  
 quality of the act made afterwards, to such a  
 degree, that if the act made becomes a man of a

East'n District  
July, 1820.

MAHER  
VS.  
MAYN'S HEIRS

sound mind, the person, who has made the act, must be presumed to be of sound mind at the time of making it. *Loco citato.* He adds: Petrus Magilanus, adopting the sentiment of a great number of others, observes that if it be proved that a madman has lucid intervals, and should make an act becoming a man of sound mind, then from the very quality of the act, it must be presumed that the act has been made at the time of a lucid interval, and therefore it shall be valid. *Id.*

Chancellor d'Aguesseau, in his famous argument, in the case of the abbe d'Orleans, treated of all that concerns insanity with a superiority of genius, which was the characteristic of that illustrious magistrate. He said: it may be confessed, that the wisdom of a testament is, without difficulty, a very strong presumption of the sanity of the testator. It was by the authority of this presumption that the senate of Rome anciently confirmed a testament made by a madman, because there was nothing in it, but reasonable dispositions. It was probably presumed that it had been made in a lucid interval, and no regard was paid to the unquestionable insanity of the testator, in order to consider only the uncontested wisdom of the testament. It was also, for a like reason, that the emperor

Leo, the philosopher, decided in his 39th novel, that the testament of a prodigal *interdicted* ought to be executed, provided it should not contain any thing unbecoming the wisdom of a good father of family.

Eastern District.  
July, 1820.

MADE  
IN  
AVART'S REIN.

As to the suicide of Erasmus R. Avart, in which some would find an evident proof of insanity, and particularly the judge *a quo* in his reasons for refusing a new trial, I would observe that it is true, in some particular instances, that madmen have committed suicide; but it is paralogizing, it is infringing the precept of logic which forbids to conclude from the particular to the general, to say that all suicides are the acts of madmen. Never has suicide been considered as the necessary effect of madness. The only question which has been agitated concerning suicide, by great men of all ages and countries, is whether it be an act of cowardice or bravery; much has been ably said for and against and *adhuc sub judice lis est*. A celebrated author has written, on the subject of suicide, two admirable letters; one for, and the other against. Let any one read those letters of Jean Jacques Rousseau, and I am persuaded, that it is ten to one, that he will consider the arguments for suicide a great deal stronger, than those against it, though the author's intention was to be a-

East'n District.  
July, 1820.



MARIE

vs.

AVARY'S HEIRS.

gainst it. What can be answered to what he says in the first letter?

“According to them (the sophists) it is cowardice to rid one's self from grief and pain, and those are cowards, who put an end to their existence. O Rome, the conqueror of the world! That Arria, Eponina, Lucretia be called cowards, may be conceived: they were women. But, Brutus, but Cassius, and thou, who didst share with the gods, the respect of mortals, great and wise Cato, whose august and sacred image filled thy countrymen with a holy zeal, and made tyrants tremble, thy proud admirers were far from thinking, that one day, in the dusty recesses of a college, vile schoolmen would demonstrate that it was through cowardice, that thou didst refuse to successful crime the homage due to enslaved virtue. O modern writers! how great and sublime are you, and with what intrepidity do you wield a pen!”

We will add here the remark made by a great writer, after reading Rousseau's letters:—

“Let us not trust to the prejudices of ages and nations. When it is not fashionable to kill one's self, those who do it are considered as mad; all acts of valour are as many chimeras for weak souls: every one judges of others by

himself. However, how many well attested ex-  
 amples have we of wise men in every other re-  
 spect who, without remorse, without madness,  
 without despair, renounce life, only because they  
 are tired of it, and die with more composure than  
 they lived!"

East'n District.  
 July, 1820.

MARTIN  
 vs.

AVART'S HEIRS.

But even if it be admitted that suicide is al-  
 ways the effect of madness, Avart's will was re-  
 ceived after suicide had been committed by the  
 testator, and of course at a time when he could  
 be in a lucid interval.

Yes, it was in a lucid interval it was receiv-  
 ed. The judge *a quo*, through whom every  
 particle of testimony went to the jury in this  
 case, in refusing the new trial, says: *no doubt,*  
*in this case, that the testator appeared of sound*  
*mind to the notary, as long as he remained with*  
*him; and a little after, he adds, we think then,*  
*and so will every body, that the notary was im-*  
*posed upon* (meaning, without doubt, *deceived*,  
 which is the correct translation of the word  
*tromper* in this case) *by the lucid interval in*  
*which he found the testator.*

Is it not evident from these expressions, us-  
 ed by the judge *a quo* that he took for his guide  
 the French laws, which do not permit to make  
 a will in a lucid interval? This is a question,  
 which I beg this court to weigh in their wis-

East'n District.  
July, 1820.

MARIE  
vs.  
AVARE'S HEIRS.

dom and decide in their justice. *If the testator appeared of sound mind to the notary, as long as he remained with him, how, in the name of God, did he not appear so to the witnesses? And if he did not appear of sound mind to them, how, in the name of God again, could they certify that he did, without the least representation to the notary on that score? That no such representation was made to the notary, appears in what the judge, a quo, says of the testimony given in court by Pignatel, one of the witnesses: that it is somewhat less explicit than that given by the other witnesses, which shows that not even a doubt was suggested by the witnesses, at the time of making the will.*

Again, if the testimony, given by one of the witnesses to the will, is not explicit, then the three witnesses do not prove, as Febrero says, *in a clear and convincing manner* that the testator was not in a lucid interval, when he made his will, and for that reason, it ought to be maintained.

I ought to stop here, convinced that what I have said is sufficient to determine the court to decide that the defendants cannot contest the will of their brother for cause of insanity, or at least that no testimony was admissible against

the attestation of the notary and witnesses, contained in the will, that the testator was of sound mind, no fraud or constraint being alleged. But the plaintiff has appealed from the refusal of the parish judge to grant a new trial, and it is the duty of her counsel to examine whether he did not err in this respect.

East'n District.  
July, 1830.

Maria  
vs.  
Avier's heirs.

Judges, as all other public officers, are essentially established for the advantage of society. Their first guide, that which they cannot abandon without prevarication, is the law ; their first duty, that of which they must be the slaves, is justice. In certain cases a discretionary power is left them ; but always under the solemn, though tacit condition, that they shall use it only for the promotion of justice.

Let us weigh the reasons which might have induced the judge to refuse the new trial and those which ought to have induced him to grant it ; as I take it to be the rule that when this court are of opinion that, had they been in the place of the judge *a quo*, they would have granted the new trial, they are bound by law and their conscience to order it to be granted.

The law says, *that, as well in causes where facts are tried by a jury, as where the trial is had by the court, whenever new evidence, material to the cause, shall have been discovered af-*

East'n District  
July, 1820.

*Marie*  
vs.  
AVANT'S HEIRS.

*ter the said trial, which the party could not, by reasonable diligence, have discovered before, if it shall appear that justice has not been done, the court, on the application of the party injured by such verdict or decision, may grant a new trial.*

The plaintiff's counsel having discovered, after the trial, new evidence, of the nature contemplated by the law, applied for a new trial.

What were the motives of the judge in refusing it? Before transcribing them, let me be permitted to make an observation, on a doubt which the judge expressed, and on which I would expatiate, were I not the person who made the affidavit. It is a maxim of law, I believe, that what a person declares, under oath, is to be believed, till the contrary is proved, and according to this maxim, I think the judge would not have been correct had he done, what he declares, with a sham generosity, to have waived to do, that is : *expatiating in order to ascertain whether or not, the new evidence, by reasonable diligence, could have been discovered before.*

He says that Cherbonnier's testimony (offered to prove, that he saw the testator about two hours after he made his will, remained and conversed with him a considerable time, and verily

believes that he was, during the whole of that time, of sound mind) not being stronger than that of father Antonio, who was introduced to the testator, just as he had finished his will, and declared that the testator had appeared of sound mind, the court could not be convinced that this weaker and later testimony, could alter the opinion of the jury.

East'n District.  
July, 1820.



MAINT  
vs.  
AVANT'S HEIRS.

How could the judge know, what impression the testimony of Cherbonnier, added to that of father Anthonio, would make in the minds of the jury. The judge might declare that such testimony would not alter his opinion; but it seems to me, that he went too far, in deciding for the jury.

The judge declares that the testimony of Ristaud, is no more material, than that of Cherbonnier, because it *only corroborates what is evidenced by the testament; that is to say, the testator's constant desire to make the plaintiff free.* Had the judge paid any attention to the signification of these words, when he put them on paper? What! the testament evidences by itself the testator's *constant desire* to make the plaintiff free? If it does, I must confess my incapacity of discovering it.

But let us see, what the testimony of Ristaud would have established. It would have shown

East'n District.  
July, 1920.

MAIRE  
vs.  
AVART'S HEIR.

that Choppin, the brother-in-law, and the intimate friend of Erasmus R. Avart, and who of course knew whether Avart was mad or not, had lent him the day before, a check in order to purchase the plaintiff, and emancipate her, and that the disposition of Avart, in favour of the plaintiff and her child, was the consequence of a premeditated and long entertained resolution of the testator, of which he had informed a man nearly related to him, his sister's husband.

It is a testimony of this kind that the judge calls trifling, and which he takes upon himself to declare incapable of operating on the minds of the jury? How! a jury would not have a strong reason to believe that Avart's insanity was not a fact so constant, when they should have seen that his brother-in-law lent him a check, of no small amount, since it was for the purchase of the plaintiff and her child, the very day before he made his will! Is money now so easily to be had, as to be lent to madmen?

Let us now examine, what reasons ought to have induced him to grant the new trial.

What the plaintiff and her child had at stake, in this case, was their freedom, a thing which the Roman law, agreeing with that of nature and reason, proclaims emphatically *inestimable*.

*hilia res*, and the Spanish law *la libertad es una de las mas honradas cosas, e mas caras de este mundo*. Part. 4, 22, 8. By the judgment she and her child (the blood of the testator) were deprived of the blessing which the testator bestowed on them.

East'n District.  
July, 1820.

Mante  
vs.  
Avant's heirs.

What injury could result to the defendants, if a new trial was granted? If their cause was so evidently just, that it left in the mind of the judge no shadow of doubt, a new jury would have given a similar verdict. There was no fear that a jury would have been influenced by any consideration whatsoever, in favor of the plaintiff, to the detriment of the defendants. She poor, a slave and of a colour reprobated by our social institutions, having to contend with many respectable, wealthy and influential citizens, would have obtained only what strict justice could not have refused.

One of the reasons on which the judge grounds his refusal is, that the statute provides that a special verdict shall be conclusive between the parties as to the facts in the cause as well in the court where the cause is tried, as on the appeal, and *must be the judgment of the court*. The law does not say that the finding of the jury shall be the judgment of the court, because in such a case, it would be a general finding, which is reprov'd by law.

East'n District.  
July, 1890.

MARIE  
vs.

AVANT'S HEIRS.

Has the legislator meant that the judge should always adhere to the special finding of the jury, however unjust, or erroneous it may be? No such monstrosity: he has taken the care, with a paternal solicitude, to add immediately to that legal disposition two provisos: one of which is, that *nothing shall prevent the court from granting a new trial, when by law, either of the two parties is entitled to the same.*

The very reason that the special finding of the jury was to be conclusive against Marie, on the appeal, ought to have been a consideration for the judge below to grant a new trial, in which his conscience, better informed, would have guided more surely his justice.

But it was enough to determine him to grant the new trial, that new and material testimony had been discovered.

We have often seen judges after deciding cases themselves grant new trials, for, they were convinced their judgments were not infallible, and their minds were always open to conviction.

Have we not seen many a time this court, where certainly we are not to find less information and experience than in our other courts, grant rehearings and alter decisions which they had rendered after the most mature reflexion?

And, in this conduct, which does the more honor to the judges who preside, the public find an assurance, that their only aim is justice.

East'n District.  
July, 1820.

MARIE  
VS.  
AVANT'S HEIRS.

*Mazureau*, for the defendants. The record shows that the plaintiff did not object to the introduction of any witness, offered by the defendants.

The 10th section of the act of 1817, has provided, that in every case to be tried by a jury, if one of the parties demand, that the facts, set forth in the petition and answer, should be submitted to a jury, to have a special verdict thereon, both parties shall proceed, before the swearing of the jury, to make a written statement of the facts so alleged and denied, the pertinency of which statement shall be judged of by the court and signed by the judge, and the jury shall be sworn to decide the question of fact or facts, so alleged and denied, and their verdict, or opinion thereof, shall be unanimously given in open court, and shall be recorded by the clerk, and after having been so given and recorded, be conclusive between the parties, as to the facts in said cause, as well in the court where the said cause is tried, as on the appeal, &c. *Acts of 1817, p. 32.*

Desirous of availing themselves of this pro-

East'n District.  
July, 1820.

MAHE  
vs.

AVANT'S heirs.

vision, the defendants who, in their answer, had alleged that the testator was not of sound mind, when he made his will, reduced this proposition to writing, requested the judge to sanction it by his signature, in order that it might be submitted to the jury. This was opposed by the plaintiff's counsel; but the judge, being satisfied with the pertinency of the statement or issue, signed and submitted it to the jury. The plaintiff's counsel took his bill of exceptions.

The only question before this court is, did the judge err in allowing this issue to be submitted to the jury, in other words is it a pertinent one?

Our statute provides that no disposition *causa mortis* shall henceforth be made, otherwise than by last will or testament, *Code Civil*, 227, art. 81, and to make a donation *inter vivos* or *mortis causa*, one must be of sound mind. *Id.* 208, art. 4.

In vain, in order to avoid the fact of the sanity of the testator's mind being submitted to the jury, did the plaintiff's counsel invoke the part of the statute, which provides that, after the death of a person interdicted, the validity of acts done by him or her cannot be contested for cause of insanity, unless the interdiction was pronounced or petitioned for, previous to the death of such person. *Id.* 80, art. 10. Admit-

ting this provision to be applicable to *all acts*, East's District  
 without any distinction, and consequently to testaments, it prevents, at most, the introduction of  
 any other proof of the insanity of the testator, *July, 1820.*  
 than the sentence of the competent judge, or a  
 petition presented to him to procure the inter-  
 diction. *MADE*  
*Vol*  
*AVANT'S CASE*

If the plaintiff's counsel had thought that this part of the code prevented the introduction of oral evidence of the insanity of the testator, after the jury were sworn, he would have opposed the introduction of such evidence, and if his objections had been overruled, he would have excepted to the opinion of the court. The record shows he did not do so; the conclusion presents itself forcibly to the mind, that he then thought, as I do, that this provision of the code is not applicable to testaments. But, whatever his opinion may have been, he ought to have excepted to the opinion of the court *a quo*, admitting improper testimony. Questions of this kind can be examined in this court upon a bill of exceptions only.

In saying that the plaintiff's counsel ought to have excepted to the introduction of witnesses, if any were introduced, to prove the insanity of the testator, I am supported by the law and practice of this court. It cannot notice any fact which

East'n District  
July, 1820.

MAVER  
vs.  
AYAR'S HEIRS

does not appear by a statement legally made. It cannot notice a fact mentioned in the opinion of the inferior judge. Nothing, in the record of this case, shows on what kind of proof the jury have pronounced, nor that any piece of evidence offered was objected to.

I might stop here, as to the first ground taken by the opposite counsel; but, I am willing to admit, for argument's sake, that without any opposition having been made thereto below, and although no part of the record shows that any oral evidence was tendered, he may urge, in this court, that such evidence was inadmissible.

However general and indefinite, the provision of the statute relied on by the plaintiff's counsel (*Civ. Code, 80, art. 16.*) it is incorrect to say that it extends to all acts, without distinction, even to donations *causa mortis*.

I admit that this provision is an innovation and that before the promulgation of the civil code, interdiction on account of insanity was not known to our laws; hence, I conclude that it is not in the Spanish law, that we are to take a guide in the application of this new provision. We ought rather to seek for information in the work, from which this amendment in our jurisprudence has been drawn, the Napoleon code, from the 504th article of which the article under consideration is literally copied.

If we find that this 504th article is considered by the courts and jurists of France inapplicable to a testament, unless the reasons on which the restriction is grounded appear to us in opposition to the sound rules of interpretation, we will be induced to conclude that the same expressions, literally copied in the corresponding part of our code, ought not to receive a greater extension. What is reasonable and just in France, must be equally so in every other country, on the same principles.

Before I proceed to examine the decisions of the superior courts of France, and the opinions of the ablest lawyers of that country, I must pray the court to observe that another article of our code, cited by the plaintiff's counsel is also, a literal copy of the corresponding one in the *Napoleon Code*. To make a donation *inter vivos* or *causa mortis* one must be of sound mind. *Civil Code*, 108, art. 5. To make a donation either *inter vivos*, or *causa mortis* one must be of sound mind. *Code Napoleon*, 901.

Paillet is the first author, to the works of which I am to draw the attention of the court. In his note on the 504th art. of the *Napoleon Code*, of which the corresponding article in our code is a literal copy, he observes : the acts of

East'n District.  
July, 1820.

MARTIN  
VS.  
APANT'S HEIRS

East'n District  
July, 1920.

MAIRIE  
VS.

AWART'S HEIRS.

a person, who died before the promulgation of the code, may be attacked on the ground of insanity, although no interdiction was provoked before his death. The 901st article which provides that in order to dispose of one's property by donation or testament, one must be of sound mind, has received no restriction from the 504th article, which is applicable only to ordinary acts, and not to donations and testaments. The utmost latitude is left to courts to admit and reject evidence of insanity, in regard to a will or donation. *Cour de Poitiers, May 27, 1908.*

In the proces verbal of the council of state, containing the debates on the project of the code (*vol. 2, p. 137*) we find that the 17th article of the project, in the title of *majority and interdiction*, which is now the same article in the same title, and the 504th of the code, was proposed and adopted, in the same words, and without any difference from the corresponding article in our code.

We find also, *id.* 318, that the disposition contained in the 901st article, was in the project expressed thus: "in order to make a disposition *inter vivos* or *mortis causa* one must be of sound mind. These acts are not be attacked on the ground of insanity, except in the case and in the mode prescribed by the 17th article of the title of *majority and interdiction*."

If the legislators of France had intended that the 17th article of the project, now the 504th of the code, should be applied to donations and wills, as to other acts, it is clear that they would have preserved the second part of this 981st article, which in the project was the 16th of the first chapter, entitled of *the capacity to dispose or receive by donation inter vivos or testament*.

East'n District.  
July, 1890.

Mante  
vs.  
Avant's heirs.

We find in the same volume, p. 350, that one of the members of the council, Cambaceres, then second consul, and one of the most enlightened lawyers of France, thought that *this second part presented a disposition too absolute*; that another member, Tronchet, not less celebrated as a jurist, added that *the 17th article of the project (now the 504th of the code) to which reference is made, is too restricted*. "It allows only the family to plead the insanity of the grantor" says he "when his interdiction was provoked during his life: but the family hoping for the recovery of their chief, are long prevented by such an hope, from provoking his interdiction;" that Cambaceres added "the first part of the article provides for every case. Insanity is a fact, and the law determines how it is to be proven; the second present the inconveniences of which citizen Tronchet speaks,

East'n District.  
July, 1820.

MAKIE  
vs.  
AVANT'S HEIRS.

it is unfavorable to legal heirs, and in opposition to the spirit of our legislation, which favors them :” he added afterwards - “ much latitude is to be given to proof ; it ought not to be restricted by conditions which some times totally exclude it. An individual may have preserved a sound mind, till a very short period before the donation or will, and then it becomes impossible to prove his insanity, if the restriction is preserved. The first part contains a plain rule, which suffices : the rest ought to be left to the court.”

Emmery, another member, observed that the 17th article of the title, *interdiction*, in the project, the 504th of the code, does not relate to donations or testaments.

We find, by the code itself, that the first part of the article was alone adopted ; and the second was rejected, and this according to the observations of Cambaceres ; or, as was said by the orators of government, when they presented the work of the council of state to the legislative body : “ the will of him who disposes, ought to be certain ; it cannot exist, if he be not of sound mind : it has sufficed to express thus, the general principle, *to make a donation in vivos or a will, one must be of sound mind*, in order to leave to the judge the utmost latitude in its application.

It is then clear that the legislators of France, Eastern District  
July, 1820.  
did not intend that the 504th article of the Na-  
poleon code should extend to donations or  
wills. MERIV  
VS  
AVARY'S ADMIN.

If we except a decision of one of the courts of appeal, soon after the promulgation of the code of Napoleon, all the sovereign courts of France, and principally the court of cassation have consecrated the principle, we have cited from Paillet, viz. that the 504th article, which prohibits an act to be attacked on the ground of the insanity of the maker, does not extend to donations and wills, and that the 901st, which requires that a donor or testator should be of sound mind, is not restrained by the 504th.

In a decree of the court of cassation, of the 22d of November, 1810, that tribunal "considering that the article 504th of the Napoleon code is not applicable to donations *inter vivos*, or testaments, which are especially regulated by the 901st article, definitively adopted and promulgated in these words: to make a donation *inter vivos*, or a testament, one must be of sound mind, there results, from the generality of the expressions used, that notwithstanding the articles 1344, 1347, 1352, and 1353, of said code, parties are permitted to allege, and courts to receive, proof of facts from which it may result

East'n District  
July, 1830.

M. R. S.

AVANT'S ESTATE.

that a donor or testator was not of sound mind, when the deed of gift or will was executed, without enquiring whether these facts are or are not evidence of a permanent insanity, rejects, &c. 11 Syrey, 75, 1st part.

The imperial court of Colmar, in a decree of the 17th of June, 1812, expresses itself thus: "whereas of all the allegations of the appellees, to set aside the will made by Magdalen Joegen, on the 1st of September, 1808, the first and principal one is, that they maintain and offer to prove that before, at the time of and after the execution of the will, the testatrix was in a permanent state of weakness of mind, childhood and even imbecillity; and it is important, before examining the case further, to ascertain the truth of these allegations, which may have a material influence on the cause, and whereas this proof is admissible, although an interdiction was pronounced or provoked against the testatrix, before her death, because, according to the 901st article of the Napoleon code, one must be of sound mind to make a donation *inter vivos*; a fact not of the substance of the act, though essential to its validity. And whereas the article 504, was improperly relied on by the appellants, since the legislature did not intend to extend it to testaments, which are re-

gulated by the article 901; for these reasons without pronouncing on the merits, and with a reservation to the parties of their respective rights, the court allows proof to be made of the alleged insanity, &c.<sup>22</sup>

East'n District  
July, 1820.

MARIA  
vs.  
ANTHONY ELISE

I do not pretend to place these cases before this court as precedents of binding authority, neither do I contend that the arguments of these tribunals are entitled to any other weight than that which they derive from their conformity to principles, recognised in our courts.

But before we examine the motives which actuated the tribunals of France, let us notice the attempt of the plaintiff's counsel. He contends that the will contains an enunciative clause, that the notary and witnesses have found the testator sick, but of sound mind, memory and understanding, as it appeared to them, and that now to admit parol proof of the contrary, would be to violate a provision of our statute, which prohibits such a proof against or beyond the contents of an act. *Civil Code, 310, art. 242.*

In the first of the two cases, which I have just cited, two questions were submitted to the court. Was the testatrix of sound mind, as the instrument mentioned? Did she dictate the will, as is therein expressed, or, as is alleged, was her tongue so swollen that she was unable to

East'n District.  
July, 1820

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MARIE

VS.  
AVANT'S HEIRS.

articulate any sound, which might be understood ?

The legatees relied on the 504th article of the Napoleon code ; and contended that, since the testatrix died *integri status*, and no interdiction was pronounced or provoked, the code forbade any inquiry as to the sanity of her mind ; that this article reached all the acts of the testatrix, and was applicable to the will, unless it was held that a will is not an act.

The heirs replied that the legislator had not intended to extend the article 504th to donations and wills, since it has provided for acts of this kind in a special article—the 901st.

The legatees urged, before the court of cassation, that two notaries having certified in the will that the testatrix was of *sound mind*, memory and understanding, the testimony of these officers, clothed with the confidence of the law, could not be balanced or destroyed by oral evidence, without a violation of the article 1341 of the code Napoleon, which prohibits oral evidence against or beyond the contents of an act.

The attorney general Merlin thought that the word *act* was not necessarily to be extended to donations and last wills ; that the article 504 could not aid in the interpretation of the article 901 ; that such was the manifest intention of the council of state.

He observed that there was an essential difference between the offer of proving that the testatrix was insane, when the will was made, and that of proving that she had not dictated it, since her tongue was so much swollen that she could not articulate a word. The first allegation does not give the formal lie to the act; it does not tend to prove any thing *against* it—the contents of an act, because a notary who enounces in a will that the testator is of sound mind, does not speak affirmatively thereon: he only indicates what appears to him: he does not establish the sanity of the testator's mind—this is foreign to his duties. Whatever he says thereon is out of the substance of the act, and appears only a simple enunciation, without any importance, in the eye of the law: his assertion is no proof and does not prevent the admission of parol evidence. As to the offer of proof that the testatrix did not dictate the will, he considered it directly against the contents of the act, because the declaration of the notary is, in this respect, affirmative and of the substance of the act; his office being to certify that the testator dictates his will.

In every act, says d'Aguesseau, we are to distinguish two species of things, the one, which is of the substance of the act, is the convention

East'n District.  
July, 1820.

MARIN  
DE

AVANT'S HEIR.

East'n District  
July, 1820.

MARIS  
vs.  
AVANT'S ESTATE

which it contains, *negocium quod geritur*, the other the capacity, will and disposition of the party. The first, i. e. the clauses, the stipulations, the nature of the act, are proven by the act itself: we may add what concerns the exterior solemnity of the act, of this the law neither requires nor admits any other proof. *Contrascriptum testimonium, non scriptum testimonium non admittitur.* Not so with regard to the capacity of the party: the act supposes, but does not prove it. The act is not intended to establish this, none of the intervening parties, think of the proof of this fact: they do not question it. The notary, witness of the engagement which is taken, is not charged by the law with being the judge of the capacity of the parties: it suffices that they do not appear to him incapable. This is so true, that though in last wills usage has introduced a clause, in which it is stated that the testator is of *sound mind, memory and understanding*, it is never considered as written proof of mental sanity. The court has often decided that, notwithstanding this clause, the allegation of the testator's insanity is admissible, and without the acts being attacked as false, because, in this respect, the notary steps out of the line of his duty. He is indeed, an instrumentary witness, honored with

the confidence of the law, depository of the public faith; all this, that he may bear a faithful testimony of what passes between the parties, not to judge of their capacity or wisdom. *Agnesseau, 27, plaidoyer 1, Symp, 1st part, 72, 73.*

Wm. District.  
July, 1830.

Wm.  
or.

Agnesseau's name.

To those arguments of d'Agnesseau and Merlin, nothing, that I can say, can add weight. I will only ask the court to remark, that the clause of a will, in which the testator is stated to be of sound memory and understanding, has only been introduced in France by usage; usage has recently only introduced it among us. Neither our former nor our present system of laws make it the duty of the notary or witness to speak of the sanity of a testator's mind. No part of the acts of our legislature requires it. As to the Spanish laws, we would in vain seek in them any thing that would justify the pretension of a notary, to set himself up, either as a judge or an irrecusable witness of the soundness of mind of an individual, who applies to him to receive his will.

The 103d law of the 18th title of the third partida, the only one which treats of a nuncupative will, requires that the testator should dictate and the notary write down his dispositions; that he should himself express the situation of

East'n District.  
July, 1820.

MADE  
BY  
ADAM'S WINE.

his mind ; not that this should be done by the notary ; not that the notary should report or relate what the testator has said ; but that he should write down the will, from beginning to end, causing always the testator to speak in the first person of the indicative present. "I, all those, who these presents shall see, know that I, Stephen Fernandez, being sick of body but sound of mind, make this my testament, in which I declare my last will. I bequeath, &c."

This law of the *partida* has not been repealed or modified by any subsequent one. The forms, which are found in Spanish books of practice, are all conformable to this law, particularly *Febrero*, part 1, ch. 1. § final.

These authorities will suffice to shew that the authorities drawn from d'Aguesseau and Merlin, and the decisions of the sovereign courts of France, are to have considerable weight with us.

It does not follow, from the circumstance that a few notaries have lately been pleased to alter the form of receiving last wills, which the law prescribes, and to set down, not the state of mind, in which the testator has declared himself to be, but their own individual opinion of it, that it is either reasonable or legal to contend that when the notary's enunciation, attested by the

witnesses, that the testator is of sound mind, memory and understanding, appears in a will, parol evidence of the contrary cannot be received.

East'n District.  
July, 1820.

MARRIS  
vs.  
AVAST'S ESTATE.

The plaintiff's counsel urges that it cannot be denied that in France, this question has been diversely determined, and the judges have here a greater latitude than there. He ought to have known, that the decisions of the sovereign courts, and principally of that of cassation, are in opposition to the interpretation he gives to the law; an interpretation which does appear to have been admitted but once, in one of the courts of appeals, soon after the promulgation of the code. He ought to have known also, that if judges have any latitude in France, it is only that which the law allows to them: and that there is a court of cassation established for the sole purpose of revoking, annulling, and reversing decisions of courts of original and appellate jurisdiction, which contravene the dispositions of the law. He ought to have known that the decision of this last tribunal, which condemns the principle he contends for, is grounded on a precise text of law, the article 901 of the *Code Napoleon*, of which the corresponding article in our code, is a literal copy.

East's District  
July, 1820.

MAHIT  
vs.  
AVANT'S HEIRS

We are told that courts must decide, not in conformity to anterior decisions, but in conformity to the law. This is surely, a very correct proposition. It ought to govern, where a clear and precise law has been eluded, and instead of taking the law for a guide, a decision has taken place according to that of another tribunal, in a like case. This proposition ought nevertheless to be disregarded, and we ought to be on our guard against it, where we have to apply a new law, containing dispositions, apparently general, which may render illusory any other disposition, not less textual, but special; then wisdom, prudence, and modesty require that we should avail ourselves of the labours of learned men, in the country from which we derived the new law. Reason tells us they must understand it better than us. If all precedents were to be disregarded, would the legislature have made it the duty of the governor to procure the decisions of our supreme court for the information of inferior tribunals.

Admitting, however, that instead of availing ourselves of the information of the lawyers of France, on a legal disposition for which we are indebted to the wisdom of the French code, it should be our duty to consult Spanish writers only, or the code of that nation, I can only

show without resorting to other authorities, than those adduced by the plaintiff's counsel, that the jurisprudence of Spain is not less unfavorable to him than that of France.

East'n District,  
July, 1820.

MARIE  
vs.  
AVANT'S ESTATE

"All those, who are not prohibited by the laws of this our book, can make a will: those who cannot make it are these, the son, under paternal power, &c. Farther, he who has lost the usage of his mind, while he is in such a situation. *El que fuesse salido de su memoria, non pueda facer testamento mientras que fuesse desmemoriado*, Part. 6, 1, 13.

"Likewise, the mad and the insane, *loco y desmemoriado*, cannot make a will, while they are so. But the will is good that was made before the insanity or madness, as well as that which is made during a lucid interval, provided it be perfected during such interval: but if before it be perfected, the phrensy returns, it is invalid—and thus, in order to annul the will of a madman, who has lucid intervals, it is necessary to prove conclusively, by the notary and instrumentary witnesses, that at the time the will was made, he was mad, and not in a lucid interval." *Febrero, contratos*, 1, 1, n. 10.

How can the plaintiff's counsel urge that parol evidence of the testator's insanity cannot be received, when the will contains the enuncia-

East'n District,  
July, 1820.

MARIN  
VS.  
ANTONY'S HEIRS.

five clause that the testator was of sound mind? Had it escaped him that the law of the *partidas* requires, and *Febrero* teaches, that the will ought to contain this clause?

"Men often make their testaments, and a testament ought to be thus written: Know all men, who shall see these presents, that I, Stephen Fernandez, being infirm in body, but of sound mind, make this my testament, in which I declare my last will. First, I give to the church, &c. and thus ought the notary write down all the legacies. If, per adventure, the testator desires that it be written down that he disinherits his son, the notary ought to put down the reasons, &c. After which, it ought to be said, at the end: I, Stephen Fernandez, aforesaid, order and require that this my testament, and last will be valid forever: and I desire and order that every testament or bequest, which I may have made before this, be cancelled and invalid; and if any other my last will and testament should thereafter appear made after this, I do will and desire it may not be valid, unless therein mention should especially be made of this, saying that I revoke it, or any part thereof. And the notary ought to say, in what place the will was made, before what witnesses, and the day, month and year.

If usage has introduced in France, the clause, by which the notary certifies the state of mind, in which the testator appeared to be, it is evident that it is by usage also that the clause has been introduced here, as has been already observed. The law cited clearly and precisely shews that it is the testator himself, who ought to declare that he is sound of mind, and the province of the notary and witnesses is only to bear faithful testimony of such a declaration: but not to certify the state of the testator's mind.

East'n District.  
July, 1820.

MARIE  
vs.  
AYANT'S HEIRS.

If then, the only difference between what happens in France, and what is done here, be that, there the usage which is followed leads to no consequence, but that the one adopted here of late, by the notaries, be a direct violation of a positive law, not abrogated, is it reasonable to say that, in the case before us, oral evidence ought to have been rejected? On what grounds, could these depositions be rejected?

The plaintiff's counsel, when he launched into pompous declamations, on the pretended danger of admitting these depositions, in opposition to the clause in the will, ought to have reflected, that if there was any infraction of the law, the notary alone was guilty of it, in putting in the mouth of the witnesses, what could only

East'n District.  
July, 1830.

MAINE  
vs.

AYER'S HEIRS.

legally come from that of the testator. Will this wrong of the notary deprive the defendants of the right which, according to Febrero, the law gives them to examine these witnesses, under oath, on the state of the testator's mind. No; this would be substituting the will of man to that of the law.

The authorities drawn from Covarrubias, Castillo, &c. vanish before that drawn from Febrero. Were we without the latter, it is not to be believed that the former would have much weight. Indeed, can it be reasonably urged that there exists no difference between a solemn deposition made under the sanction of religion, in the presence of a magistrate, the organ of the law, and a simple allegation, subscribed by witnesses, whom the plaintiff's counsel admits are often taken at random, and on whom little reliance can be placed?


If there be, in the case under consideration, any apparent contradiction between a clause of the will, and the deposition of its subscribing witnesses, under their oaths, this results from the *fault* of the notary. This fault might occasion the nullity of the will; for it is a violation of the only law, which prescribes the form to be observed by the notary in receiving a will.

Will it be said, that although the subscribing witnesses may be admitted to depose, their deposition does not suffice alone, and without that of the notary? One word suffices in answer to this—the notary is the plaintiff's counsel, and a particular law of this state forbids counsel being sworn for or against their clients.

It is clear, that notwithstanding the mention made in the will of the sanity of the testator, oral evidence was admissible of the contrary. This is the case, even as to clauses which are of the substance of the will; as those which express that it was dictated by the testator and written by the notary. Since the promulgation of the code, notwithstanding the provision that no parol evidence is to be admitted against or beyond the contents of an act, witnesses have been heard in order to set aside a will in which it was falsely mentioned that these formalities had been accurately fulfilled. *Knight vs Smith*, 3 *Martin*, 156. The decision, in this case, is grounded on the ancient laws of the country. "In the will ought to be expressed the place, day, month and year; and the witnesses who were present at its execution, with the name of each one, before whom and the notary: the testator ought to express his intentions clearly and distinctly, so that each of them may hear

East'n District  
July, 1820.

MARTIN  
VS  
AVANT'S HEIRS.

East'n District: him at the same time, and that in case of doubt,  
*July, 1820.*  
  
 MANIS *they may all of them depose, being thereupon*  
 vs. *interrogated. Febrero, Contratos, 1, § 49, a*  
 AVART'S HEIRS. 207.

Although I have noticed, and I believe have shown the futility of, all the objections of the plaintiff's counsel, I beg leave to remind the court that the only question before it is that which results from the only bill of exceptions, in this case, taken on the decision of the parish court, in allowing the issue, proposed by the defendants to be submitted to the jury, viz. whether E. A. Avart was of sound mind, at the time of making the last will or testament, upon which the present action is brought?

As to the kind of proof resorted to, in order to satisfy the jury that the testator was not of sound mind, no question is before the court and it cannot judge of the legality of such proof. The plaintiff's counsel had it in his power, by a bill of exceptions, to bring the question before this court; he declined or neglected availing himself of it. It is now too late.

As to the new trial, I contend that the decision of the inferior judge, in refusing to grant it, cannot be appealed from. The grant or denial of a new trial is entirely left by law to the dis-

cretion of the judge. Indeed, in order that the supreme court could take cognizance of the question, it would be necessary that it should have before it all the circumstances, which may have weighed with the inferior tribunal. In the present case, no part of the evidence has been taken down, and if this court were to pass on it, it would have nothing before it, but the affidavit, not of the plaintiff, but of her counsel.

Was this affidavit admissible? Was not the reading of it a violation of the statute, which forbids an attorney to be witness for or against his client? Will it be said that the maxim *no testis in propria causa* does not preclude the party himself from testifying, in order to procure a new trial, that he has discovered new evidence, which, with ordinary diligence, he could not obtain before the trial? Let us admit, for argument's sake, that the client and his attorney are, in this respect, as two partners or solidary debtors. Would it suffice that either of the partners or debtors should swear that he has discovered new and material evidence, which, with ordinary diligence, he could not have obtained before. Would it follow from the circumstance of one of the parties not having discovered the evidence until after the trial, that the other was not apprized of its existence.

Eastern District.  
July, 1820.

MAIRIE  
VS.

ATLANT'S DEBIT.

East'n District.  
July, 1820.

MAHE

AVANT'S HEIR

In this case, the client may have known, that which her attorney swears he was ignorant of. The law does not make it the duty of the attorney to seek for evidence, it imposes that obligation on the client. The latter, therefore, not the former, ought to swear, in order to obtain a new trial, that he was ignorant of the existence of the newly discovered evidence, and that he neglected none of the means, in his power, to procure it. 2 *Martin's Digest*, 156.

There is only one case in which the party's own affidavit may be dispensed with ; when he is absent.

Vainly it will be said that the plaintiff, in the present case, is a slave and cannot bear testimony against a white person. While the law permits her to sue, it impliedly authorizes her to do whatever is necessary to obtain a fair decision of her claim.

I have said that, in order that this court might examine the conduct of the parish judge, in pronouncing on the motion for a new trial, it would be necessary that it should be in possession of every fact, that may have influenced his decision. How, otherwise, can it say that he erred, in considering the evidence newly discovered as less strong, less clear, and less positive, than that which had been introduced at the

trial? Can this court, without knowing what evidence was before the jury, determine that it would be outweighed by that which was alleged to have been newly discovered? The parish judge had means to discover the truth, which are not, cannot be placed within the reach of this court. He heard the testimony from the lips of each witness, he noticed his natural or studied mien, his calmness or agitation, his assurance or his timidity.

East'n District.  
July, 1820.

MARIE  
vs.  
AYART'S HEIRS.

Admitting, however, for the sake of argument, that this court, notwithstanding all this, may think itself competent to revise the decision of an inferior court, in denying a new trial, let us examine the evidence which is pretended to have been discovered.

Cherbonier, it is said, went to the testator's, about two hours after the will was made, and remained with him a considerable time. He conversed with him and verily believes that, during the whole time, he was of sound mind.

But, let us notice first, what is much stronger. Father Antonio, introduced as a witness by the plaintiff, had informed the jury that, half an hour after the will was signed, he was with the testator, administered spiritual relief to him, and he then appeared calm and of sound mind. Whatever res-

East'n District  
July, 1820.

MARIN  
vs.

AVART'S HEIRS.

pect may be due to the testimony of Cherbonier, we doubt that it would have had more weight with the jury, than that of the venerable clergyman.

The question, submitted to the jury, was not whether the testator was of sound mind, *before* or *after* he made the will, but simply whether he was so *at the time*, he dictated and subscribed it. This they have answered negatively: and it is impossible to imagine that the verdict of the jury would have been different, had it been previously shown, that Cherbonier, or any other person, believed him of sound mind *before* or *after*. Cherbonier proved his *belief*, not the *existence* of this fact.

The plaintiff was enabled to shew that Ristean was with the testator, after he had stabbed himself and *before* the will was made, when Choppin, the testator's brother in law, took from a desk a check which he had given the later, on the preceding day, to enable him to purchase the plaintiff for the purpose of emancipating her.

We are ignorant of, but are willing to believe, all this, because Ristean appears to have told it to the plaintiff's counsel. All that result from it, is that, when Choppin gave the check to his brother in law, he believed him of sound mind, not that he was so, at the time the will was made. If it be

true that the amount of the check was to be appropriated to the purchase of the plaintiff, with a view to emancipate her, the circumstance, of his having inserted in the will a clause which tended to carry his project into execution, does not establish the fact of his being of sound mind, *when* he made the will.

East'n District.  
July, 1820.

MAHE  
OF  
AVART' SHIRTS.

All that result from this, is that the idea of Marie filled his mind, that his passion for that slave ruled him and was perhaps the cause of his insanity and his death. Is it surprising that a man enamoured in perfect health, should have the object dear to his heart present to his mind in a moment of delirium : and when, in such a situation, he speaks of her, are we to conclude that he is in his perfect senses ?

The court will appreciate the grounds, on which the plaintiff's counsel declares himself fully convinced of the goodness of his cause : we confidently wait their decision, relying too much on their justice and learning to apprehend that a mistaken sense of humanity will induce them to disregard the disposition of the law.

*De Armas*, for the plaintiff. I candidly admit that I incorrectly stated that witnesses were offered to prove the insanity of the testator and that I excepted

East'n District.  
July, 1820.

MARIE  
vs.  
AVART'S HEIRS.

to their introduction. The fact is that, when the issue intended to be submitted to the jury was about to be reduced to writing and before they were sworn, I opposed the submission of it to the jury, as forbidden by the statute, *Code Civ.* 80, *art.* 17. The judge overruled my opposition and I tendered and he signed the bill of exceptions which comes up with the record. A mere reading of this bill is sufficient to shew that I opposed the introduction of any kind of proof whatever, of the fact that the testator was not of sound mind, at the making of the will. In good logic, the whole includes all the parts. So, it is in jurisprudence. *In toto pars continetur. l. 13 de reg. juris. In eo quod plus est, semper est et minus.* So it was needless for me to repeat my opposition, when each witness was offered. The court must see by a reference to the article of the code, which I relied on, that it was less to the submission of the issue to the jury, than to the introduction of evidence to support it, that I objected. The bill clearly shews that the defendants had no record, shewing that the interdiction of the testator had either been obtained or provoked. Without this, could they be allowed to attack the will on the score of the testator's insanity? Whether the evidence was written or oral, it was


equally inadmissible. It was prohibited by the part of our statute which forbids that, after the death of an individual, the validity of acts done by him be contested, for cause of insanity, unless his interdiction was pronounced or petitioned for before his death, and that part which forbids that evidence be admitted beyond or against the contents of an act, *Civ. Code 81, art. 16 and 311, art. 242.*

The first of these articles is copied from the 504th of the Napoleon Code, as the article 4, page 209 of our code is copied from the 901st. The articles of our code are, in the classification of the whole work, in the same order, as the corresponding ones of the Napoleon Code. If the principle, which in France, has led courts and jurists to conclude that the article 504, includes donations and wills be true, just and reasonable in all countries, we ought to adopt it, unless that, which has influenced other courts and jurists to adopt a different opinion, appear to us more true, more just or more reasonable. Let us therefore inter into this enquiry, which is to direct the decision of this case.

A number of celebrated jurists have emitted their opinions, before and since the decree of the court of cassation on which the defendants' counsel chiefly relies, and they all conclude that the 504th article

East'n District.

July 1820.

  
MARIE  
vs.  
AVART'S HEIRS.

East'n District.  
July, 1820.

~  
MARIE  
OF.  
AVART'S HEIRS.

includes donations and wills. In 8 *Pand. Fr.* 523, we have observations on the 901st article.

According to the 503d article, if the interdiction of the donor or testator has been pronounced, allegation and proof may be received of the existence of the insanity, at the time of the donation or testament. So, according to the 504th, when the interdiction was at least provoked, during the life of the donor or testator. In the contrary case, the proof of insanity must result from the very act which is attacked, otherwise the plea of insanity cannot avail.

It is to be admitted this rule is extremely strict and may give rise to great inconveniencies. It affords, says the sovereign court of Montpellier, great facilities to those who seek to obtain the liberalities of a mad or insane man.

It is nevertheless incontestable that the relations ought to reproach to themselves that they did not provoke the interdiction. Courts, heretofore were very severe, on a plea of insanity and the proof of it was admitted with much difficulty. They objected to relations, as was well observed by senator Tronchet, that they came too late. *Sero accusas mores quos probasti.* The most positive facts was necessary and a sort of notoriety, to induce courts to receive evidence, and it was required to be conclu-

sive to support a decision annulling the instrument. East'n District,  
July, 1820.

His serene highness the Chancellor of the empire observed that proof was not to be so restricted as to exclude evidence. The party, said he, may have preserved a sound mind, till a period very near that of the donation or will ; and then it becomes impossible to prove the insanity. He concluded it would be best to leave the matter to the courts.

We would cheerfully join in this opinion. It is difficult to establish precise rules, in cases which depend upon facts, and it may be dangerous to hold out facilities to intrigue and bad faith. It seems nevertheless that the silence of the law, in this title, does not allow a deviation from the articles 503 and 504. Some one (probably Emery, in the discussion in the council of state) has said that they do not relate either to donations or testaments ; but it suffices to read them, in order to be convinced that they extend to every act whatever.

Delvincourt, in his *Cours du Code Napoléon*, 710, says : the opinion that the 504th article is not applicable to donations or testaments is grounded on two reasons. The one, that if it was, the 901st would be absolutely useless : the other, that in the

MARIE  
vs.

AVART'S HEIRS.

East'n District.  
July, 1820.

— MARIE  
— vs.

AVANT'S HEIRS.

*projet du Code* a paragraph had been added to the 901st article, which referred to the 504th, and in the discussion this paragraph was suppressed. It seems to me that it may be observed, on the latter reason, that it does not appear that the paragraph was *rejected*, but only *adjourned* till the reconsideration of the 504th article, which was to have taken place, but did not. To contend that a distinction is to be made between acts on an onerous and those on a gratuitous title, and that the 504th article does not extend to the last, appears to me an opinion which cannot be reconciled with the text, which makes no distinction, and with reason, which seems to dictate that it is principally to the latter that the article is applicable, as they are those which heirs have the most interest to avoid and which are consequently to be protected against their avidity.

Masse, in his *Parfait Notaire*, published in Paris in 1813, three years after the decree of the court of cassation, cited by the defendants' counsel, a decree which must have been known to him, not only on account of the important point it decided, but on account of the nature of the action in which it was rendered, as I will shew by and by, observes: there are four kinds of incapacities common to donors and testators. He, who is not of sound

mind, cannot dispose by donation *inter vivos* nor by testament, *Code Nap.* 901, so, an insane person cannot dispose on a gratuitous title; nevertheless, after his death, the disposition cannot be attacked, on this score, if the interdiction of the donor or testator was not pronounced or provoked, before his death, unless the proof of insanity should result from the act which is attacked, as if it contain foolish dispositions.

East'n District  
July, 1820.

MARIE  
OF  
AVART'S HEIRE

Bernardi, to whom we are indebted for the greater part of the new edition of Pothier's works in harmony with the Code Napoleon, in his commentary on the laws relating to donations and testaments, says: in order to make a donation *inter vivos* or a testament, one must be of sound mind. This disposition seems at first sight singular. Why should it be in a special manner required that he, who wishes to make a donation or a testament, should be of sound mind? Is not this required from every man who does any act whatever? Are not all contracts entered into, while the sanity of the party's mind is altered, liable to be set aside? In what does consist this sanity of mind, which the law more specially requires in a donor or testator? How are the different shades to be distinguished, which denote a mind perfectly sound? A singularity or od-

East's District.  
July, 1829.

MAHE  
VS.  
MAHE'S HEIRS.

dity in character are not always sufficient to establish the unsoundness of mind. The wills of the greatest men, says d'Aguesseau, would not be safe, if it sufficed, in attacking them, to give some evidence of the oddity or singularity of the testator's mind. *Plaid. 29.*

Sanity of mind, if that expression may be used, is undoubtedly necessary to the donor or testator. By it we mean the state of a mind neither agitated or troubled, master of itself, as far as human passion allow. As in speaking of the body we cannot say that one is sick, unless a strong fever or other violent sickness exist: speaking of the mind, it would be absurd to say that its sanity is lost, when the mind is not agitated by madness or its functions prevented by imbecility.

It cannot be holden that a man is incapacitated from making a disposition of his property because his mind is less settled or weaker than that of an ordinary man, while he preserves that understanding which is required for the conduct of ordinary affairs and the discharge of common duties.

If in order to pronounce on the validity of a will a stricter inquiry was requisite, lawyers alone could not pronounce thereon; the aid of physicians and philosophers would become necessary.

Calange observes that in the project of the *Code Napoleon*, a paragraph was added to the 901st article which provided that these acts should not be attacked, &c. That it was observed it presented a too general proposition; that insanity is a fact, to which the genenal rules of evidence apply; that relations, relying on the return of the party's sanity, delayed to solicit his interdiction; that the testator might have preserved his health of mind until a few moments before his death; that more latitude was to be left to courts, and parol evidence ought to be admitted when there is a beginning of proof in writing.

East District  
July, 1820.

MAINT  
BY  
AVANT'S HEIRS.

Are we to conclude, says he, that the 504th article is not applicable to donations and testaments, and that after the death of a donor or testator, the sanity of his mind may be questioned, when his interdiction was not provoked before and no proof of insanity resulted from the deed of gift or testament? The 504th article is imperative, has received no modification, its disposition is general and was made so, with a view to donors and testators chiefly. 12 *Nouveau Denisart*, 668.

The jurists, who have reduced to a regular order, the result of the discussions of the *Napoleon Code* in the council of state, attending to the plan given

East'n District  
July, 1823.

MARIE

vs.  
AVART'S HEIRS.

them by the minister, observe on the 901st article, that it contains only one of the plainest and general principles of natural reason and could afford no matter for discussion.

A donor or testator is of right inferred to be of sound mind unless the act itself offers some evidence of the contrary: otherwise the party who endeavours to set aside the disposition will not be attended to, after the death of the donor or testator, whose interdiction he neglected to provoke.

The same principle is found in 2 *Pigeau*, 86.

The 503d article of the *Napoleon Code* proves that acts anterior to the interdiction may be set aside, if the cause of the interdiction notoriously existed at the time such acts were made, and this disposition, evidently extending to donations and testaments, shews that the testament of one who dies in a state of interdiction remains valid, if the cause of the interdiction is not shown to have existed at the time it was made. 2 *Questions transitaires sur le Code Napoléon*, 440.

In support of these respectable and conclusive authorities, I have met with four solemn decisions 3, *Sirey*, p. 273, part 2; 5, *ib.* p. 209, part 2; 16, *ib.* p. 238, part 2; *Jur. du Code Nap.* vol. 1, p. 305.

In one of these, the heirs who attacked the testa-

ment, contended, that insanity is often produced by a violent paroxysm, so that when a person, attending a sick man, avails himself of the temporary alienation of his mind, in a moment of delirium, to obtain a donation or will, it cannot be expected that the interdiction of the donor or testator be provoked, so as to prevent the party enjoying the fruit of his covetousness. The friends of the sick person may be ignorant of the circumstance. Who is the son, who will provoke the interdiction of a parent, because the paroxysm of a fever has momentarily deprived him of the use of his mental faculties?

East'n District.  
July, 1820.

MARIE  
vs.  
AVART' HEIR.

They took notice that, in the discussion which took place in the council of state, it was asked whether the nullity of a testament, could not be pronounced, on account of the insanity of the testator, when the interdiction of the testator was not provoked, when it was answered (and it will be recollected that the observation was made by Mr. Emmery) that the dispositions of the article 504 were not applicable to testaments. These observations, which the defendants' counsel uses in the present case, did not prevent the court of appeal from declaring that according to the 504th article of the *Napoleon Code*, after the death of an indi-

East'n District.  
July, 1850.

MARIE  
vs.  
AVART'S HEIRS.

vidual, none of his acts can be attacked on the score of his insanity, unless the proof resulted from the act itself.

The defendants' counsel has stated that the principle he contends for, is supported by the most enlightened and the most illustrious jurists of France. He has however cited Merlin alone. For we cannot do him the injustice to imagine that he classes Paillet among these jurists. This writer being only known as the editor of a Code Civil with notes.

The counsel has joined together two notes of Paillet, which are absolutely unconnected in his work. The first is entirely without any bearing on the question before the court, since the date of Avart's testament is posterior to the code. As to the second, I have to observe that the case referred to is the same as that in which the decree of the court of cassation cited was rendered.

I have sought in vain, in the place indicated by the defendants' counsel, what he says he has found, viz: that the second part of the 901st article was *rejected*, and this on the observations made by Cambaceres, or because "the will of him who disposes ought to be certain: and this will cannot even exist, if he be not of sound mind. It has been sufficient to state only the general principle (in order

to make a donation *inter vivos* or a testament one must be of sound mind) in order to leave to judges the utmost latitude, in its application."

East'n District.  
July, 1820.

MARIE

AVANT'S PRESS.

I admit, I cannot comprehend how the defendants' counsel has been able to find, in these last expressions, the motive for the rejection of this second part, and I cannot conceive how he could advance that it was rejected, when at the end of the discussion of the 901st article, with which he has favored us, we read, in the two lines which follow the observations of Emmery, that the 504th article relates neither to donations nor testaments, these remarkable words which cannot have escaped the notice of the counsel, "the first part of the article was adopted, the second *adjourned*, till after a new examination of the 504th article."

To show in what point of view the decree of the court of cassation, cited by the defendants' counsel, and the principle on which it is grounded, were looked upon even in France, let me submit to the court the very sound and learned observations of M. Côtelle, L. L. D. and law professor in the faculty of Paris, in his much celebrated work 1, *Cours de droit Français*, p. 320, § 1.

"Of the incapacity relative to the state of mind

East'n District.  
July, 1820.

MARIE

VS.  
AVANT'S HEIRS.

of the donor or testator, and of the condition of being of sound mind.

The interpreters of the code have often fallen into a great inconvenience, that of seing in the code only new dispositions, and of thus detaching them from our ancient jurisprudence, for the purpose of explaining the code by new and particular considerations, which are no where else to be found. It would appear that these interpreters do not perceive that such an isolated mode of proceeding, tends to destroy the progress, which our jurisprudence had already made; that they are retrograding in the science, and plunging into such a course of arbitrary decisions that ages will be requisite to recover the elements of a sound, and above all, a constant and uniform jurisprudence. This should be a subject of reflection especially to those who unite with this pernicious facility, a great fund of legal knowledge. From some of the simple expressions, which *escaped* from those who cooperated in the discussions of the code, maxims have been drawn of which these persons *had no idea whatever*; (*This remark evidently applies to what M. Emery has said in the discussion of the article 901,*) the mere placing of certain legal dispositions, under a title different from that which usually announced the principles ex-

pressed in those dispositions, appears to have favored this system of innovation.

East's District  
July, 1830.

Maxim

AVANT'S USE

I shall be excused for this reflection, if I find here a just occasion to apply it; it is in the use which is made of the 504th article of the code.

This article only expressed a general rule, known in the ancient jurisprudence, and which served as a corrective of the abuse which might be made of the maxim, written in all our local laws, (*coutumes*) that in order to give or to devise the donor or testator must be of sound mind.

This maxim, reproduced by the article 504, was that at the death of an individual, the acts done by him may be attacked for cause of insanity, only when his interdiction has been legally pronounced or demanded before his decease, unless the proof of the insanity should result from the very act which is attacked.

All the difficulty, which has been raised upon this article, consists in this, that being placed in the chapter concerning interdiction, it has not been repeated in the chapter on donations, where the other maxim forming the article 901 has been placed, to wit: that he who makes a donation or a will must be sound of mind. From hence it has been concluded that the article 504 relates solely to acts

Eastern District.

July, 1823.

MAINT

OF

AVART'S HEIR.

on an onerous title and not to donations and wills, against which it is pretended that the allegation of insanity ought always to be indistinctly admitted in proof.

This is the doctrine which we find in the treatise on donations and wills, *part 1, ch. 3, § 2*. There this disposition is considered as having no relation whatever with the article 901; it is there considered that this disposition of the article 504 applies principally to the ordinary acts of life, such as acts on an onerous title, and to an habitual state of madness very different from that contemplated by the article 901; that if the legislator intended that this article 504 should also relate to gratuitous dispositions, he would have explained himself to that effect in the title on donations and wills, and that he could not have said in a different manner, in that title, that it was necessary to be of sound mind.

That which gives an imposing weight to this doctrine is the support which the author of the work finds in the decree of the court of cassation of the 22d November, 1810, which he cites, (*this is also the decree wherein the defendants' counsel has intrenched himself and where he believes himself to be invincible*). Probably, if Grenier, the author to whom Cotelle alludes here, had written

before the decree, his doctrine would be quite the reverse) which decree rendered upon the conclusions of the attorney general has confirmed almost literally his doctrine.

East'n District  
July, 1830.  
MARTIN  
AYART'S DEEDS

We may even remark the absolute and indefinite terms in which this decree declares, in the motives assigned for the rejection of the appeal, (*pourvoi*) that notwithstanding the article 1341, 1347, 1352 and 1353 of the code it is permitted to parties to alledge and to the tribunals to admit them, (*here a specimen of the latitude, the courts in France have or take for themselves*) to prove all the facts of a nature fit to establish that the author of a donation or of a will was not of sound mind, at the time of making those acts, without distinguishing whether those facts did or did not constitute a permanent state of madness.

In fine it is further shown that this decree is only the result of the doctrine contained in the new repertory of jurisprudence under the word testament. (*It is to be observed that the volume, containing this doctrine of Merlin, was published, in 1809, one year after the judgment of the court of Poitiers.*)

Far it be from me to refuse the homage due to the court of cassation, whether considered as the first of the bodies of sovereign magistracy, to which

East'n District  
July, 1890.

MAKIN  
IN  
AVANT'S HEIRS

the law itself confides its interests and the care of its interpretation; or the first luminary which shines in the midst of us on all the subjects of our jurisprudence.

I know well the great number of men deeply learned, and religiously attached to the study of reconciling the genius and the spirit of the laws with the great interests which are entrusted to them, by which this tribunal is composed.

I am not less inclined to a great respect for the talents and opinions of the first of magistrates (who are as it were the eye of the law) who has personally left traces so extensive and profound of his progress in the study of jurisprudence.

But if every thing has not been said on this point, if even in the great exactness which this decision might in itself possess it has really gone too far; in a word if some rays of light may yet be employed to confirm that decision or to conduct us in its consequences, I may be permitted to examine the grounds upon which this jurisprudence rests and above all to inquire whether it is not, taken in its full extent, the useless and dangerous subversion of a just, enlightened and reasonable jurisprudence which has hitherto prevailed.

The author having devoted several pages to the

examination of the principles of the ancient jurisprudence by which France was governed, concludes thus, page 326.)

East'n District.  
July, 1820.

It appears then that the makers of the code have inserted in it the article 504 only in order to preserve that jurisprudence with which they were familiar, as well as that relative to ordinary acts and on an onerous title, attacked in the same circumstances and for the same causes.

AYART'S SERIES.

How then comes it to be said that this disposition is restrained to acts on an onerous title? *It is evident that, on the contrary, the acts of liberality have afforded more frequent occasions of putting this point in question.*

The reason drawn from this, that the article 901 states in general terms that it is necessary to be of sound mind without repeating the dispositions of the article 504, is of no weight. For in as much as this exception was already written that was a sufficient reason for not repeating it.

And moreover the article 504 is not relative to that general proposition, but only to the use of attacking the condition of a person who might and ought to be interdicted; and this makes no change in the rule, that to dispose of property it is necessary to be of sound mind.

East's District  
July, 1820.

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MAYOR

AVANT'S HEIRS

This rule was found in the greatest part of the *coutumes*, and it is nothing else but a general rule of law from which has resulted the rule of jurisprudence contained in the article 504.

To conclude, this article is placed there among other dispositions which regulate the condition of persons (*the corresponding article of our code is in like manner placed among the same dispositions*;) it is there in order to be applied to *all acts without distinction* where the condition of the person may be made a ground for contesting the validity of his act."

According to the authorities which I have cited, it is then incorrect to say that in France the intention of the legislator was not that the 504th article of the *Code Napoleon* should extend to donation *causa mortis* or testaments, as it does to ordinary acts. The defendants' counsel urges that, with the exception of a judgment of a court of appeals, shortly after the promulgation of the Code, the decisions of all the sovereign courts of France and particularly that of the court of cassation have sanctioned the principle for which he contends. I have sought with care in the *jurisprudence du Code Civil*, in *Denevers* and *Sirey*, which are the most complete collections of the decisions of the sovereign courts

of France, and I have discovered only the two decrees cited by the defendants' counsel; when I have found four in support of the principle which I contend for, and on which I shall draw the attention of the court hereafter. True it is that three out of those four, are anterior to the decree of the court of cassation and were rendered shortly after the promulgation of the French Code; but to urge that these decisions are not correct, because they were given only a short time subsequent to the decision and promulgation of the code, would be going against what the experience of all ages and countries has constantly taught, to wit: that the less time which has elapsed since a thing took place, the better we are acquainted with it.

East's District,  
July, 1830.

MADE  
TO  
AVANT'S HEARS.

But let us fix our attention on the decree of the *Court of Cassation*, of the 22d of Nov. 1810, confirming the judgment of the *Court de Poitiers* of May 27, 1808, on both of which the defendants' counsel relies with so much confidence.

Surprised at finding a decree of the court of cassation, in direct opposition to the doctrine, which had prevailed till then, I have carefully examined all the circumstances of the case in which it was rendered and I find them to be these:

Marie Jacob was the wife of Francis Jalet, a pur-

Eastern District,  
July, 1820.

MARIE  
vs.  
AVANT'S HEIRS

chaser of national property, of the first and second origin, that is to say of property of the church and of property of emigrants. Her conscience not being perfectly at rest on the score of the legality of these purchases, on the last complementary day of the ninth year, she made her last will before two notaries. She began by devising in full property and for ever the portion which might belong to her, of the property of emigrants, purchased or to be purchased by her husband, to the former proprietors, if they were returned and erased from the list of emigrants, and capable of taking by devise, otherwise to such persons as were legally able to inherit their estates, in the direct or collateral line, who might enter thereon, at her death, and possess the same as such property should be, except the carts, cattle and seeds, which should go to her heirs.

By the last clause she devised to the hospital of incurable patients of Poitiers, the portion which might belong to her of national estates, proceeding from the property of the church.

Now the particular circumstances of this case easily account for a decision so much at variance with the former ones and the doctrine till then universally professed. National property was the subject of the suit and we all know how much that

kind of property kept the French people in alarm. The cause was a popular one. Judges in France have a great latitude of powers, and never did a case more loudly call for an arbitrary decision.

East'n District  
July, 1820.

MARIE

AVART'S HEIRS

Let us compare this judgment with that of the court of appeals of Paris, of the 26th of May, 1815, 16 *Sirey*, 285, *Part. 2*. Let us consider with what severity of principles the judges in the later case rejected the proof which was offered them of the marked insanity (long before the testament) of a man who had disposed of a considerable part of his property, in favour of strangers, such as old friends, lawyers, his secretary, his valet de chambre and other servants, to the prejudice of his daughters: and let us say whether precedents may be safely sought for, in the decisions of the courts of a country, in which judges may torture the law and bend it at their will.

That no written proof of any kind whatever could be shown of Avart's not being of sound mind during the time he dictated and made his will, is a proposition too clear, too self-evident to be demonstrated. By the very nature of things, no such written proof can possibly exist, unless the will itself, from beginning to end, be a forgery of the notary

East'n District  
July, 1820.

~  
MARIE

vs.

AVANT'S HEIRS

and witnesses, and in this case, it is on the score of forgery that it ought to be attacked.

Parol evidence of the insanity of the testator is then the only one which can have been adduced, and it ought to have been rejected, as prohibited by our statute which forbids the admission of parol evidence beyond or against the contents of an act.

The rule, according to which testimonial proof of the insanity of a testator is admitted in France, is grounded on the principle that as the notary and witnesses attest the *actual*, and not the *habitual* state of the testator's mind, that proof does not tend to contradict the act.

Invoking the same principle, which appears perfectly correct, and adapting it to our practice, would not the testimony contradict a testament made in this state, if while the notary and witnesses have born testimony to the sanity of the testator's mind at the time he made his will, witnesses were heard to declare that he was, at that very time, insane?

In France, they say the notary may not have noticed the insanity of the testator, whom he may have found in a state of apparent sanity, (*and this is what, among us, constitutes a lucid interval*) that the time employed in receiving the will may be too short to enable him to judge of the *habitual* state of the tes-

tator, whose dispositions, whatever may be his situation, may appear perfectly wise; and that, because the notary may have been deceived in supposing the *habitual* state of the testator's mind to be what it appears at the time, courts ought to hear witnesses (*using the very expressions of the decree of the court of cassation relied upon by the defendants' counsel*) in order "to prove the facts which are of a nature to establish that the author of a donation or of a will was not of sound mind, at the epoch those acts were made, without distinguishing whether those facts did or did not constitute a *permanent* state of insanity."

East'n District  
July, 1820.

MADE  
BY  
AVANT'S PRESS.

In the case under the consideration of this court, the will contains the attestation of the notary and three witnesses, that the testator was of sound mind. They, alone, could judge of the actual state of his mind, and no subsequent evidence, oral or written, can destroy that which thus results from the instrument. An allegation of insanity would tend to shew that the will, wise in itself, was suggested to the testator, or is a feigned one, which supposes, not an erroneous judgment in the notary, but an actual forgery. For it cannot be conceived that an insane man whilst labouring under the pressure of his disease, might dictate long and complicated dis-

East'n District.  
July 1820.

MADE  
BY  
ASST'S REINS.

positions, which bear the stamp of sound reason.

Let us now examine the positive and unabrogated law which the defendants' counsel believes to have found in the Partidas, requiring that the testator should himself express the state of his mind and understanding, and that the notary should relate what the testator has said, and should write the will from beginning to end, making the testator always speak in the first person of the indicative present.

The counsel of the defendants, from its not being made the duty of the notary or witnesses, by the ancient nor the new law to ascertain the state of the testator's mind, draws the consequence that a notary who should set himself up as the irrecusable witness or judge of the soundness of the testator's mind, would in vain seek for any thing in the Spanish law that would justify his pretensions. He says that the usage in which notaries are in this State to attest in a will the sanity of the testator has been but lately established.

The will of Domingo Trujillo, received on the 18th of May 1763, by Joseph Fernandez, an ancient Spanish notary, begins thus, "Be it known that I, D. T. being very sick, but in my entire judgment, memory and understanding, &c. and concludes" and I, the notary, do attest that I know the

testator, who, according to appearances, is in his entire judgment and complete memory, &c.

East's District  
July, 1830.

The will of Carlos Cout, received by Almonaster, on the 17th July 1771, contains precisely the same expressions.

MASSE  
vs.  
AVARY'S HEIRS.

So does that of Anna Raffians, received by the same notary, on the 19th of March 1780.

So does that of Antonio Gonzales, received by Carlos Ximenes, on the 28th of March 1798.

These wills, and a great number of others containing the same attestation by the notaries, are recorded in the office now kept by C. de Armas, a notary public in this city.

*Para el escribano lo que no le esta prohibido, se entiende permitido: y lo demas es querer ligarle por obligaciones y penas que las leyes no le imponen. 1 Febrero, 417.*

It is true that we would look in vain in the Spanish law, for a disposition, imposing on notaries the obligation of attesting the state of the testator's mind; but we have works of Spanish jurists in which they detail the duties of notaries and give forms of the different instruments executed before them.

In the form of a codicil, 1 Febrero, 216, the notary attests that the testator is *en su entero juicio*,

East'n District.  
July, 1820.

MARYE  
vs.

AVANT'S HEIRS.

altho' in the form given in the *Partidas*, no mention be made of this circumstance, either by the notary or testator.

Among the clauses that a notary is to insert in a testament which he receives, there is the following, to wit: "declaracion de la disposicion del testador: esto es que estaba al parecer en capacidad para testar, que de eso debe hacer mencion el escribano y dar fe." 2 *Lisares*, 60.

Carlos Ros, in his work on the duties of notaries vol. 2, 53, gives the following form of a will, "In the name, &c. be it known that, &c. being in perfect health, full judgment, memory, and natural understanding, and with such a disposal of my senses and faculties, that it appears to the notary and witnesses underwritten that I may indubitably dispose of my property and make my testament, which the notary certifies."

The authors, last cited, give other forms in which the like mention is made.

If according to *Partida* 3, 18, 103, which contains the form of a testament, the notary is bound to make the testator speak in the first person, in a will, the rule must be the same for a codicil. Yet we see that altho' the *Partida* 3, 18, 104, has the form of a codicil, in which the testator speaks in

the first person, Febrero, in the form of a codicil which he gives, makes him speak in the third. East'n District.  
July, 1820.

Surely, if Febrero had thought that the forms given in the partidas were like those stolen and published by Cneus Flavius, which were so rigorously to be followed that the least deviation caused the nullity of the act, he should have scrupulously followed them. Let the forms given by Febrero be compared with those in the partidas and we will be convinced how erroneous is the idea that the latter are to be literally followed. MARIE  
TO  
AVART'S HEIRS

Let us now advert to a French authority of some weight, I mean the work of Favard de l'Anglade, baron of the empire, judge of the court of cassation and member of the legion of honor, who says: "notaries, in order to comply with the requisites of the 901st article, (*this article is identical with the 5th p. 209 of our code*) ought then, before they receive any act on a gratuitous title, assure themselves of the soundness of the mind and judgment of the party who makes it. They cannot without *previ-*  
*cation* neglect this, especially when he is sick of body, or of advanced years. This omission might have consequences infinitely disagreeable for them. The law does not textually command to mention in the beginning of donations *inter vivos* and tes-

East District.  
July, 1820.

MAIRIE  
VS.  
AVART'S HEIRS.

taments that the donor or testator appeared to them of sound mind and understanding; yet they must not neglect doing so. The necessity of this mention results impliedly from the article 901, which requires that the donor or testator be of sound mind. The object of this disposition is evidently that the notary, before he receives an act of this kind, should ascertain the state of the party's mind and should attest, in the beginning, that he appeared to have the perfect use of his moral and intellectual faculties." *Manuel, &c.* 322.

I think it necessary to repeat what I have said in the beginning of this case, that the single instance in which holds the doctrine of Febrero, that *para anular el testamento del loco que tiene intervalos lucidos es menester probar concluyentemente que lo estaba y no los tenia*, is when the notary has been silent on the state of the testator's mind, either because he was not sure of it, or on any other account. I will refer here to the only form of a will given by Febrero, in which nothing is said by the notary of the state of mind of the testator, and to the will of Carlos Quiroga, received on the 28th of November, 1770 by A. Almonaster, who was in the habit of attesting the state of the testator's mind and who, nevertheless, in this instance, did not do so.

When a notary has attested in a will (and it is the same as to witnesses) that the testator, while he was disposing of his property, appeared to him of sound mind, he cannot afterwards be examined as a witness on that score; because he would confirm what he had already attested, and then his testimony would be useless, or he would deny it, and then he ought not to be heard as *allegans suam turpitudinem*.

East'n District,  
July, 1830.  
MARIE  
vs.  
AVART'S HEIRS.

The notary, who received Avart's will and who has the honour of exercising the profession of counsellor at law, was penetrated with the truth and the sanctity of these principles. He knew that he could not be heard, as a witness, concerning the will he had thus received. Even, in case he had not been engaged as counsel in support of it, strong in the testimony of his own conscience, jealous of maintaining an unimpeached reputation, he would have taken the same pains to uphold the validity of dispositions, which he has the most certain conviction were dictated to him, by a man in the perfect exercise of his moral and intellectual faculties.

The defendants' counsel has not well understood the law to which he refers, forbidding counsel being sworn in their clients' causes. Let him examine that law, 1 *Martin's Digest*, 504, and let him recollect that in many instances our courts of justice

East'n District.  
July, 1820.

~  
MARIE  
vs.  
AVANT'S HEIRS.

have declared, under that law, and that of *Partida 3, 16, 20*, which says: *Bozero non puede ser testigo del pleyto que el oviese comenzado a razonar. Pero si la parte contra quien razonase lo pudiese por testigo, entonces lo podria ser*, that a party is permitted to require the testimony of the opposite party's counsel; and he will then be convinced that the defendants, notwithstanding the circumstance of the notary's being the plaintiff's counsel, had it in their power to make the proof, as required by *Febrero*;—supposing always that the article 16, p. 80, of our code and the attestation, in the will, by the notary and witnesses, of the testator's being sound of mind, did not, either and both, absolutely oppose such a proof. Let it not be said any more, then, that the notary could not be heard as a witness, because he had permitted himself to be engaged as counsel.

It is asserted by the counsel of the defendants that "since the promulgation of our code, notwithstanding the provision that no parol evidence is to be admitted against or beyond the contents of an act, witnesses have been heard in order to set aside a will in which it was falsely mentioned that formalities of the substance of the will had been accurately complied with," and, in order to give some

weight to this assertion, he refers to the case of *East'n District Knight vs. Smith, 3 Martin, 156.* This manner of relying on a precedent is quite new to me. I have examined with a scrupulous attention the case cited and found that a last will has been declared void on the two following grounds, to wit: 1. it had not been written by the notary himself as the law requires, and 2. one of the persons mentioned in the body of the instrument as a witness, was not present when the will was dictated, nor when it was read. But I did not find, that the will falsely mentioned that it was written by the notary and that all the witnesses were present, when it was dictated or when it was read. Supposing even, that the will *falsely mentioned* these circumstances, this court having not given any opinion on the point, I do not see how the defendants' counsel could rely on this case to support his opinion, which is not only in direct opposition with the doctrine professed by Merlin, d'Aguesseau and the court of cassation, which he cites, but not supported at all by the passage of Febrero which he quotes. This author, after mentioning the requisites of the witnesses to a will, continues thus: *ante los quales (testigos) y el escribano juntos, ha de manifestar el testador verbal, clara y distintamente su voluntad, de suerte que to*

East'n District  
July, 1820.

MAHE  
vs.  
AVANT'S HEIRS.

East'n District.  
July, 1830.

MARIE

vs.

AVART'S HEIRS.

*dos a un mismo tiempo la entiendan, y en caso de duda puedan deponer contextes, siendo sobre ella interrogados. Ella* most evidently refers to *voluntad*.

Is it not clear, then, that what is thus required from the notary and witnesses, is in order that if there be any *doubt* concerning the intention expressed by the testator, his *voluntad*, they may declare *contextes*, (that is to say, each making the same deposition as the others) in order to *explain*, not to *contradict*, that *voluntad*?

Let us notice the jurisprudence of Spain as it existed here before the adoption of the civil code, with reference to the mode of proof of the insanity of a testator at the time a will was made.

Either the notary and witnesses were silent on this point, or the fact was attested by the notary alone, or by him and the witnesses.

The first case is that to which is applicable Febrero's doctrine, that the testimony of the notary and witnesses ought to be heard.

In the second, if the witnesses deposed against the sanity of the testator, the rule in *Partida* 3, 18, 117, was followed. *Si el (escribano) otorgase que verdad era que escribiera (la carta) y los testigos que fuesen escritos en ella, dixesen que non se acertaron y, quando el pleyto fue puesto, nin otorgado*

*de las partes así como es escrito en ella ; entonces* East'n District,  
July, 1820.  
*decimos, que si el escribano es ome de buena fama*  
*y fallara en la nota que es escrita en el registro, que*  
*acuerda con la carta, que debe ser creído el escribano*  
*y no los testigos.* This doctrine was sanctioned by

this court, 5 *Martin*, 405, *Langlish vs. Schons & al.*

In the third case, the will was of itself evidence of the sanity of the testator's mind.

Though I feel confident that the court will pronounce that the article 16, p. 80 of our code applies to all acts, and that no proof being given of Avart's interdiction having been demanded or obtained before his decease, his will must be maintained, I will add a few observations in answer to the arguments used by the defendants' counsel in order to prove that the new trial was rightly refused.

With as little ground, as he has accused the notary of having violated an unrepealed and unmodified law of the *Partidas*, he charges the plaintiff's counsel with a violation of the statute, which forbids an attorney to be witness for or against his client, by having filed the affidavit on record, in support of the demand of a new trial. He is deficient on the score of logic when he pretends that the plaintiff's counsel, by filing that affidavit, acted as the witness of his

MARIE  
vs.  
AVART'S HEIRS.

East'n District  
July, 1820.

~  
MARIE  
OF  
AVART'S HEIRS.

client. Certainly the principle *nemo est idoneus testis in sua causa* is a correct one and applies to the party himself. Now, if that maxim cannot be relied upon to object to the affidavit sworn to by the client, how can it be invoked against that of the counsel? This, I conceive, sufficiently shows how groundless is the new accusation against the plaintiff's counsel.

The statute concerning new trials, cited by the defendants' counsel, does not make it any more a duty to the client to search for evidence than to the attorney, and does not require in the least that a party, applying for a new trial, should swear that he was ignorant of the newly discovered evidence, any more than that he has neglected nothing to procure it. We must not lend to the law a language which it has not made use of. This is the wording of the statute: *whenever new evidence material to the cause shall have been discovered, after the trial, which the party could not by reasonable diligence have discovered before—the court, on the application of the party injured, may grant a new trial.*

These plain expressions of the law show how unlucky the defendants' counsel has been in the choice of the case of partners, as the ground of his argument, pretending that it would not be sufficient that one of them should be within the words and spi-

rit of the statute to obtain a new trial, because it would not follow that the other partner was uninformed of the new evidence. If the partner is a party to the suit, if he be injured by the judgment, and if he can swear to newly discovered evidence, what court of justice would refuse the new trial on the ground that the other partner may have been apprised of this evidence? Because one partner chooses to give up his rights, is it a reason that his copartner should suffer by it? No, there is a maxim of law, which Pothier calls *generalissima regula*, which says: *non debet alteri per alterum iniqua conditio inferri*, l. 74, *ff. de reg. jur.* from which flows the doctrine which we see established in l. 39, *ff. neg. gest. naturalis enim, simul et civilis ratio suavit, alienam conditionem meliorem quidem etiam ignorantis et invito nos facere posse; deteriolem non posse.*

As our manner of proceeding in matters of new trial is borrowed from the common law practice, prudence, wisdom and modesty require that we should consult common law decisions rendered by men whom we must suppose better informed than us in that part. In 8 *Johnson* 489, in the case of *Jackson vs. Laird*, we see that: the verdict being found for the plaintiff, a motion is made in behalf of the defendant for a new trial on the ground of new and material evi-

East'n District,  
July, 1820.

MARIE  
vs.

AVARY'S HEIRS

East'n District.  
July, 1820.

MARIE  
vs.  
AVART'S HEIRS.

dence. Cornwell, to whom the defendant had abandoned the defence of the suit, in his affidavit, swore that though Fink was a witness at the trial of the cause, yet he did not know Fink knew or could testify any thing material in the cause, until after the trial. But it appears that the defendant, who was not however present at the trial, knew before the trial what Fink could testify. *Per curiam.* The testimony of Fink is material; it is true that Fink was present at the trial and *that the defendant knew beforehand what he could prove.* But the defendant was not present at the trial and Cornwell, to whom he had abandoned the defense, swears, that he knew nothing of this testimony until after the trial. The motion for a new trial is therefore granted.

Under the *Part. 3, 5, 4*, which, in favour of liberty, not only permits to a slave to appear in court for the recovery of his freedom, but authorises any one, whether a relation to the slave or a stranger, to act in his behalf, though without any mandate to that effect, Marie has entrusted to me the care of prosecuting her rights, she has abandoned to me the defence of her cause. From the moment I accepted of the charge, I became her *personero*, and from the moment the issue was joined, I was authorised by law to act in her name and to do in her

behalf, even in case she should die, all that she could personally do, till the final decision of the suit.

East'n District.  
July, 1820.

*Part. 3, 5, 23*, sanctioned by a decision of this court, 4 *Martin*, 486, *Montreuil vs. Jumonville*.

MARIE  
TO  
AVART'S HEIR.

To the case, which the defendants' counsel boldly maintains is the only one in which the party's own affidavit may be dispensed with, to wit: "when he is absent," I think we can add those of a father, of a husband, of a tutor, of a testamentary executor, of a copartner, of a colitigant, of a *personero*, &c. ?

The defendants' counsel calls into question that this court can take cognizance of the denial of a new trial by an inferior court. This point has been already wisely settled in the case of *Sorrel vs. St. Julien*, 4 *Martin* 508, "The nature of the discretion of the courts below (said the learned and upright judge who delivered the opinion of the court in that case) in granting and denying new trials, is not an arbitrary but a sound, legal and judicial discretion, to be guided by fixed principles and subject to the revision of this court." In an other passage of the same opinion, we read these precious and comforting words: *this court will relieve on the improper denial of a new trial, when thereby the party sustains an irreparable injury.*

That my client has sustained an irreparable in-

East'n District.  
July, 1820.

MARIE  
vs.  
AVANT'S HEIRS.

jury, is self-evident. The new trial has been denied to her; contrary to the justice of her cause and the favour which the laws of all civilized nations show to persons suing for freedom, especially our local laws and those of the other states of the Union. (*For examples of the favour shewn by the courts of the sister states to paupers suing for freedom, see in Hudgins vs. Wright, 1 Hening and Munford, 134 and Isaac vs. Johnson, 5 Munford, 95.*) Her cause is one of the most favourable in the eyes, I will not say of humanity, but of strict justice; it embraces the interests of a woman and of a child for whom all the laws grounded, like those which govern us, on the immutable principles of natural equity, show the most tenderness, especially when, as in this case, they sue for freedom, speaking of which, *Part. 18, 22, 3*, says: *todas las leyes la deben ayudar, quando ovieren alguna carrera, ó alguna razon por que lo puedan fazer.* Under this consideration, and this consideration alone, the new trial ought not to have been refused.

NEW authorities being introduced in the reply, the defendants' counsel had leave to answer them, at next term.

FRANÇOISE vs. DELARONDE.

East'n District,  
July, 1820.

APPEAL from the court of the first district.

FRANÇOISE

vs.

DELARONDE.

*Livingston*, for the plaintiff. In this case, the facts are that the plaintiff, being a minor then aged of four years, in the year 1792, her guardian Antonio Mendez, purchased a lot of ground with a small house thereon for her benefit, the price of the said lot being a sum of money received for a slave sold by the guardian.

The purchaser of the real estate of a minor cannot avail himself of the prescription, *brevi temporis*, if all the legal formalities were not observed in the sale.

That in the month of January 1806 (the plaintiff then being eighteen years of age) a petition was presented, by P. Pedesclaux, as attorney at law, in the name of the mother of the plaintiff and of the plaintiff herself, to judge Prevost, stating that it was for the interest of the minor that the said lot should be sold and praying leave to sell the same. This petition was never filed, but the judge wrote on the back: "let the prayer be granted the petitioner giving security for the amount of the sale, 10 January 1806, J. B. Prevost."

This petition, in original, is inserted on the notary's register and immediately after follows a sale from the mother (stiling herself *mère naturelle en sa qualité de mère autorisée par le décret du juge annexé*) to the defendant for the sum of four hundred dol-

East'n District.  
July, 1820.

FRANÇOISE  
vs.  
DELAHONDE.

lars paid in the presence of the notary. This sale is dated the same day with the order of the judge, 10 January, 1806, and it is admitted that the defendant has been in possession more than ten years after the plaintiff came of age, and, before bringing this suit, the plaintiff always residing in this city.

The law questions on which the decision must depend are : did the conveyance transfer the property to the defendant ? if it did not, is it a sufficient foundation to support his plea of prescription ?

I. The first question will not admit of much debate. The whole proceeding was irregular.

1. The judge of the superior court could not act in any other manner, than that prescribed by the act organizing the court, which passed in 1805. By that act all petitions were to be filed with the clerk. The delivery of the order to Pedesclaux on a petition never filed in the court, was extra judicial and void.

2. The mother could not act for the minor, then 18 years of age, without showing that she had been appointed curatrix.

3. The attorney could not appear for the minor without a special appointment, as curator *ad litem*.

4. The application to sell being made, as was

said, for the benefit of the minor, she ought to have signed the petition herself, and it appears in evidence that she could write.

East'n District,  
July, 1820.

FRANÇOIS  
DE  
DELAHONDE.

5. The order given by the judge was illegal because it did not appear that the minor consented to the sale; because no evidence was offered that it was necessary or useful for her to sell; because there was not even an allegation that the mother was curatrix, and, if the judge had looked at the title of the land petitioned to be sold, he could have found that the minor had a curator who was not the mother; because in the order to sell, it ought to have been expressed that the sale should have been at auction and after an appraisement; because if any security was ordered for the purpose of securing the minor's rights, it should have been directed to be taken before the sale.

6. The sale was wholly illegal: not signed by the curator, and not made in the form prescribed by law.

7. The security directed by the judge's order for the purchase money was never given.

These objections to the sale are supported by the following authorities which I refer to, after stating all the points, because most of them (the authorities) refer to all the points I have made.

East'n District.  
July, 1820.

FRANÇOISE  
vs.  
DELAHONDE.

When the mother wishes to act as guardian she must be appointed formally. The form of such appointment, *Part. 3, 18, 95.* Form of the appointment of a guardian *ad litem, ibd. 261.*

To prevent the improper alienation of the estates of minors, they are not to be sold *except to pay debts*, and even then, with the order of the judge, publicly at auction, after a notice of thirty days. The form of the sale is set forth, "*in order that the purchaser may be sure of what he purchases.*" In this form of sale the reason for selling, to wit; the debt, is recited, the application of the guardian, the exposure at public auction, and the notice of 30 days, the name of the purchaser, the certificate that the money was paid by the purchaser, and that the guardian in the presence of the notary had paid it over to the creditor of the infant in discharge of his debt, are all essential parts of the act, to which must be added, says this wise law, that the judge must certify that the guardian was duly appointed, that the debt which was the cause of selling was due, and also all the other points above enumerated. *ib. l. 69, n. 2.*

The guardian shall not give, sell, nor alienate, any of the real estate of the minor, unless he do it to pay the debts of the estate, or to marry one of his sisters, or himself, or for some other lawful cause which can-

not be avoided. And then not without the order of the judge. *Part. 6, 16, 18.*

*Si vero debita solemnitas non est observata, tunc ipso jure non valuit venditio, neque est opus restitutione, Part. 6, 19, 5, n. 3, ad fin.*

All sales by order of a judge must be at auction. *Part. 5, p. 52, 4. Febrero 3, 3, § 1, n. 67, 71.*

None of the essential requisites for making a good sale having been observed, the conveyance made by the mother in this case was of no effect and could not transfer the property, and it therefore still belongs to the plaintiff. We must then enquire,

II. Whether it is a good foundation for the plea of prescription?

This, it was agreed in the court below, was a bar in two points of view; 1st. because minors must apply for restitution within four years; 2d. that the prescription of ten years *inter presentes* applies to give the defendant a title in this case.

On the first point it is sufficient to observe, that this is not an action for *restitution* which is barred, I acknowledge, by four years after the cause was known. That action lies where the sale of a minor's estate was made, according to the forms of law; but when his interest was injured in the price

East'n District  
July, 1820.

FRANÇOISE  
DE  
DELABONDE.

East'n District.  
July, 1820.

FRANÇOISE  
vs.  
DELAHONDE.

then, in favour of his age, the law gives him the right of redemption by repaying the price in the action of *restitution*. This action, however, is brought on no such suggestion. We alledge that there was no legal sale, that the property never passed but is still in us and therefore we want no relief by way of *restitution*, but by *revindication* of the property. And when the property of a minor has been conveyed without the requisite formalities we find, by express authority, that there is no need of the action of *restitution*, but that the sale being *ipso jure* void, the minor may at any time *revindicate* the property.

To this effect is the authority above quoted from the *Partidas*. 4 *Febrero*, lib. 3, c. 3, § 1, n. 67.

When the minor sells without just cause and without the *solemnidades prescriptas por derecho*, the sale is *ipso jure* void and to rescind it he has no need to ask the aid of *restitution*, altho' it may be done to pay his debts, 4 *Febrero* 3, 3, § 1, n. 67.

We see what are the *just causes and requisite solemnities* to render the sale valid, *ibid.* 69, 70.

“Y se advierte lo primero que omitiendose las *solemnidades expresadas* no necesita el menor *implorar el auxilio de la restitution in integrum*, porque quando la ley irrita y annula el contrato cesa el oficio del juez acerca de ella por lo que puede revocar di-

rectamente la enagenacion del poseedor." *ibid.* 71.

East'n District  
July, 1820.

We have then only to enquire, whether the sale be a sufficient foundation for a title by prescription.

FRANÇOIS  
DE  
DELABONDE.

If I have succeeded in shewing that the sale to the defendant was deficient in the essential forms, this will be an easy task; for our statute, *Code Civ.* 488. *art.* 70, directs us on this point: "when a title is defective, with respect to form, it cannot become the basis of the ten or of the twenty years prescription."

And again, *art.* 67 and 68, the title must be a just title, and a *just title* is one by virtue of which property may be transferred. Here the title wanted those forms which alone could transfer property.

The title must be a just one: that is such a one as would convey the property, if the vendor was the owner, and the purchaser must have legal cause to believe the vendor to be the owner. Now here the title, so far from being one translatif of property, is declared to be *ipso jure* void; if so, no title at all and of course no foundation for a prescription.

Pothier, who lays down the same position, illustrates it by several cases. The institution as an heir of a person incapable of inheriting is not a just title and therefore if the instituted heir ignorant of his incapacity should take possession, yet he could not

East'n District  
July, 1870.



FRANÇOISE  
vs.  
DELARONDE.

prescribe! *Pothier, traité de la prescription, n. 85.*

The same of a legatee incapable of receiving.

A donation between married persons carries the same consequences, *ibid. n. 87.*

If, for example, you purchased from a tutor, an estate belonging to his ward, *without the compliance with any of the formalities, required for the alienation of a minor's estate*, you will not be able to prescribe, and your title will not avail you. Vainly will you say you thought the seller could sell. You ought to have known the law decided the contrary and you cannot fail being classed among purchasers who knew the defect of their titles. *Nouveau Dugod, 26, 27.*

Here all the defects were glaring and were such as the purchaser was bound to notice.

By the title deed for the property which he purchased, it appears that the mother was not the guardian but that A. Mendez was.

The judge ought to have ascertained this point before he gave the order; but as the purchaser must have looked at the title deed before he paid his money, he must have discovered that, in treating with the mother, he was not treating with the guardian.

If it should be answered to one of the objections I have made, that the purchaser was not bound to

see that the condition for giving security was fulfilled, which the judge imposed in ordering the sale.

I reply that, if he wished to secure his purchase, it was his duty to see that all the conditions were complied with. Whenever a man lends money to refit a ship to the master, in a foreign port, he cannot recover unless the money has been thus applied. When a trustee is authorised to sell to fulfil a trust, the purchaser must not only pay his money, but see to the application of it. And in the very case before the court, we see by the forms laid down by the *Partidas* that this is of the essence of the contract, directed to be inserted in it and certified by the notary.

On the whole, I trust I have shown that the title set up by the defendant conveyed to him no property.

That it was so defective as not to be voidable only, but *ipso jure* void.

That of course, it was not necessary to sue for restitution, and that therefore the limitation of that action does not apply.

And that lastly this is not such a title as will support the plea of prescription.

*Canonge*, for the defendant. The vendee acquired a good title, because the land was sold on a spe-

East'n District.

July, 1820.

FRANÇOISE

DELAUNDE.

East'n District.  
July, 1820.

FRANÇOISE  
vs.  
DELAHONDE.

cial order of the judge, after a full statement of the circumstances which rendered the sale of the minor's property necessary. The judge imposed no other condition, but that the tutrix should give security for the amount of the price. This must be presumed to have been done, since the contrary is not alleged.

The act of 1805 relates to suits, and speaks of such petitions, by which suits originate, only, and as applications of the nature of that on which the order issued are made at chambers, no record is preserved of the evidence by which the judge is satisfied of the propriety of allowing the prayer of the applicant: his *fiat* is presumptive evidence that the necessary facts, to support the order, were made out to his satisfaction.

The sale was executed in the manner in which it was ordered by the judge.

Finally, the plaintiff, as soon as she came of age, might have brought her suit to annul, the sale or otherwise sue the defendant. This would have enabled him to have his recourse against the plaintiff's mother and to obtain the restitution of the purchase money. More than ten years have elapsed, since this might have been done. The plaintiff must be presumed to have acquiesced in the sale, and is too late in her application to claim the property sold.

MATHEWS, J. delivered the opinion of the court. East's District.  
July, 1820.  
This suit was instituted by the appellant, who was FRANÇOISE  
vs.  
DELANOUE.  
plaintiff in the court below, to recover a lot of ground, in the city of New-Orleans, as described in the petition. The defendant, in his answer, claims title to the property in dispute by purchase and by prescription.

The facts in the case show that the appellant was the owner of the lot for which she now sues—that in the month of January, 1806: being then eighteen years old, she and her mother, her natural tutrix, applied to a judge of the superior court of the late territorial government, for permission to sell the lot, by a petition, in writing. And that an order was obtained from the judge, authorising the sale, as requested, and requiring security on the part of the seller for the price. The petition and order of the judge are incorporated in the act of sale, made by the mother, as tutrix of her daughter, to the defendant and appellee. Under this sale, he has been more than ten years in possession, since the plaintiff came to the age of majority, and before bringing this suit.

On these facts, two questions of law are raised for the consideration of this court. Did the conveyance transfer the property to the defendant? If

East'n District.  
July, 1829.

FRANÇOISE  
vs.  
DELABRONDE.

it did not, is it a title sufficient to support a plea of prescription?

As to the first of these questions, we are of opinion, with the counsel of the appellant, that the act of sale was so informally and illegally made, as not to convey a valid or indefeasible title to the appellee. Tutors have no right to sell the immoveable property of their wards, unless under particular circumstances and conformably to specific formalities prescribed by law. These are fully laid down in *Partida* 3, 18, 60, which was in full force at the time the sale was made, and were not complied with.

Whether or not the conveyance be a sufficient foundation for the prescription of ten years, is a question of more difficult solution.

To acquire an indefeasible right to property, under the prescriptions of ten and twenty years, a just title, good faith and uninterrupted possession are necessary on the part of the possessor. These are fully explained by different writers on the subject. A sale made in due form, which would be translatif of property, if the seller were the real owner, although he be not, if the purchaser be ignorant of that fact, is a title sufficiently just to prescribe under. The good faith requisite for prescrip-

tion is an honest belief by the possessor that he has acquired a title to the property which he possesses : *justa opinio quæsitæ dominii*. In the present case, there is no dispute about the manner or uninterrupted of the possession.

East'n District.  
July, 1820.

FRANÇOISE  
vs  
DELAHONDE

There is no doubt of the act of sale under consideration being sufficiently formal, had the seller transferred the property as her own, to have given a title to the defendant sufficiently just to prescribe under, if he was ignorant of the fact that the property sold belonged to another person. If the sale had been made by the minor, in *propria personâ*, being above the age of fourteen years, it is believed that, according to the 59th law of the *Partida*, above cited, it might be a good foundation for the prescription relied on by the defendant, and he ought to be considered, under that law, as a possessor under a just title and in good faith. But the deed has neither of these forms : it purports to be a sale, made by a tutrix of the property of her ward, and as such is wholly informal and illegal, the requisites of the law cited not having been complied with. The vendee saw most clearly that he was purchasing from one person the property of another, and *qui sciens alienam rem emit pro emptore possidet, licet usu non capiat*, ff. 41, 4, 2.

[East'n District.

July, 1820.

FRANÇOISE

vs.

DELABONDE.

From the order of the judge, it is presumable that the defendant believed that he gained a just and legal title to the lot, under the act of sale, supposing that all the formalities required by law had been complied with. In this he mistook the law : for the manner of sale and forms required by law were not pursued ; *et nunquam in usucapionibus, juris error possessori prodest. ff. eod. lib. 3, 31.*

However much the commentators of the Roman law have differed the one from the other, and the same person from himself at different periods, on the subject of mistakes of law, they seem to agree in this, that *juris error* is never a good foundation for acquiring property. 2 *Evan's Pothier*, 409, d'A-guesseau's dissertation, 2.

In the opinion of the district court, it is assumed as true that the act of sale, under which the defendant claims a right by prescription, was executed in due form, as required in such cases by law. This is not so. In sales, made by tutors of the real estate of their pupils, it is required by the 60th law of the *Partida* above cited, that in addition to the order of the judge, authorising the sale, the property be advertised during a certain length of time, and that it be sold at auction, &c. all which is to be expressly mentioned in the deed. The title of the defendant

and appellee, being defective in this respect, cannot be the basis of the prescription. *Cod. Civ.* 488, art. 70. Possessors do not acquire a right to the property purchased by them, in virtue of the kind of prescription, by which the defendant attempts to make out his title, in the present case, solely in consequence of the real owner not pursuing his rights and making his title known, within the period limited by law. A colourable title and good faith on the part of the possessor (as we have already shown) form the legal basis of a right gained by prescription of the shorter period. In prescribing by a lapse *longi temporis*, wherein no title is necessary, the right is lost to the owner and acquired to the possessor entirely by the laches and acquiescence of the former. The neglect of the plaintiff and appellant, in not claiming the property, within the ten years since she came of age and her acquiescence under the possession of the defendant and appellee, do not, in our opinion, amount to a confirmation of title in the latter, for the reasons above adduced.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and this court proceeding to give such a judgment as in their opinion ought to

Eastern District  
July, 1820.  
  
FAYE & CO.  
OF  
DEERHOLM

East'n District.  
July, 1820.



FRANÇOISE

vs.

DELABONDE.

have been given below, it is further ordered, adjudged and decreed that the plaintiff and appellant do recover, from the defendant and appellee, the lot of ground, &c. described in the petition, and that the latter pay costs.